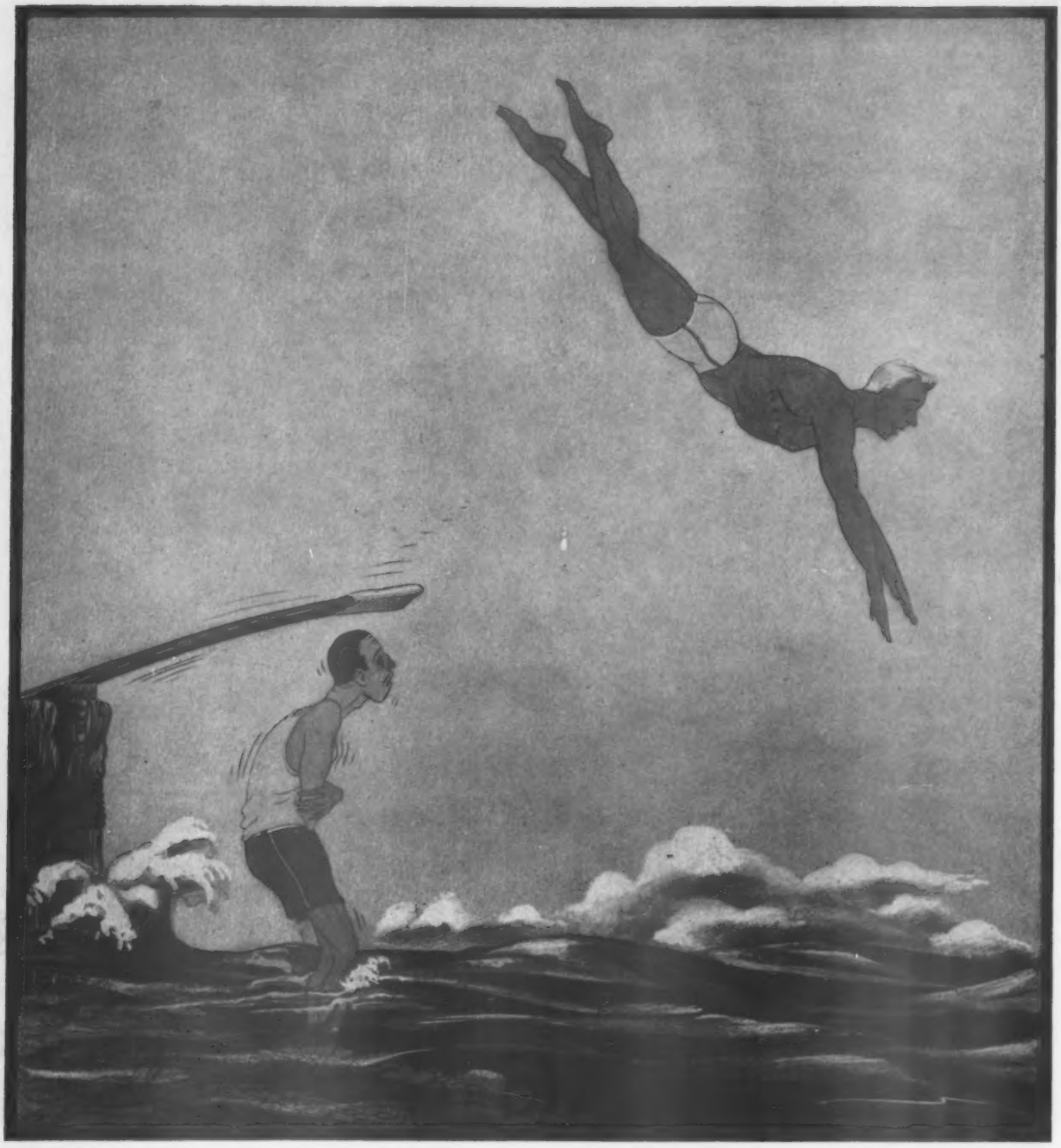
AMERICAN BAR ASSOCIATION
VOL. XXIV NO. 2 JOVRNAL FEBRUARY 1938

The Constitution of the United States. Mural in National Archives Bldg., Washington, D.C.



A FEW MINUTES observation at the water's edge will reveal two methods of getting into the water. Some people take the hard way—wading in step by step, suffering over and over again the cold shock. Others plunge right in and begin swimming.

There are two ways of entering the insurance business. One is the slower method of learning as you go. The other is to jump in from the vantage point of preparatory sales training.

The Agents Training School of The Travelers Insurance Company at Hartford, Connecticut gives a limited number of men a spring-board from which to jump into the swim of insurance selling.

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CURRENT EVENTS

Topical Index of Twenty-three Volumes of Journal

IN line with the emphasis on service to the profession as a major function of the American Bar Association and, in consequence, of its JOURNAL, the Annual Report for 1937 will contain a Topical Index of the twenty-three volumes of the JOURNAL heretofore issued. This index embraces not only the material in all of the Journals since it began publication in its present monthly form in 1920, but also that in the preceding volumes, beginning in 1915, when it first appeared, in quarterly form.

It is estimated that the index will fill about one hundred and fifty pages in the Annual Report. It was prepared by Mr. Paul H. Sanders of the Law School of Duke University, whose former connection with American Bar Association Headquarters made him largely familiar with the material to be indexed and hence particularly competent for the task. It was at first intended to publish the index in connection with a single large issue of the JOURNAL, but on further consideration it was decided that publication in the Annual Report would place it in a more permanent form and render it less likely to be mislaid or lost than a single copy of the JOURNAL.

The index refers to an immense amount of material dealing with important subjects of interest to the profession. It gives the members access to a mine of accumulated information which at some time or other they should find of very great value.

Florida Supreme Court Rejects Bar Petition

THE petition of the Florida Bar Association to the Supreme Court to organize disciplinary and other activities along the lines of the Missouri plan, to require each attorney in the state to pay a three dollar annual registration fee, and to raise the educational qualifications for admission to the bar, was rejected in a twenty-seven page opinion written by Justice Glenn Terrell and handed down on January 8. In the opinion it was held that these rules might be laid down by the Court even though the legislature has been regulating admission and disbarment since 1822 but that the present system "has been acquiesced in by the people, has been resisted by no one and has not only been acquiesced in but repeatedly approved by the courts." The only point in the bar's petititon which was granted was the request for a minimum period of law study of three years.

The day after the decision of the Supreme Court in this matter was rendered, the Executive Council of the Junior Bar Section of the Florida Bar Association, together with members of several of its most important committees, met in Jacksonville. It adopted a resolution authorizing and directing a committee representing it to file or join in the filing and presenting of a petition for rehearing and reconsideration of the matter "to the end that the court adopt or promulgate appropriate rules to accomplish the objects sought by the petition."

The resolution expressed gratification at the action of the court in raising the educational requirements for admission to the bar, though they had not been raised to the extent recommended by the petition and approved by the American Bar Association, but it declared that "this council regrets exceedingly the failure of the court to adopt any portion of Rules 3 and 4 or any modification or re-statement thereof for the purpose of regulating the conduct of members of the profession after admission, notwithstanding the fact that the court's opinion recognizes that good moral character is the most important factor in a lawyer's equipment, and that the court has inherent power to regulate such matters by rule; and further notwithstanding that there has been no denial or contention contrary to the facts alleged in the petition."

Committee on Legal Publications Takes Action

THE Special Committee of the American Bar Association to Study and Report upon the Duplication of Legal Publications met at the Hotel Stevens, Chicago, on December 30, 1937. Committees of the Association of American Law Schools and of the American Association of Law Libraries, whose work parallels to a considerable extent that of the Special Committee of this Association, attended upon the invitation of the Chairman. Unfortunately, Dean Herbert F. Goodrich of the American Law Institute, who had accepted the invitation, was unable to come.

The Chairman, Eldon R. James, of the Special Committee of this Association, presided and made a brief statement to the effect that the problems with regard to legal publications including their unnecessary duplication, as well as their increasing bulk, were difficult and complicated. The major duplication involved was to be found in the publication of separate series of the same or substantially similar reports of the decisions of the courts and that it would be desirable to consider the possibility of a single unified system of reports covering the whole of the United States. The cost of all legal publications was very materially increased by the necessity for giving duplicate or triplicate references to all cases cited.

In the Chairman's opinion, the bench and the bar were faced with so great an increase in the mere bulk of legal materials, judicial and legislative, that the present system of precedents was seriously threatened, unless some method by which the bulk could be reduced, was arrived at. There is some possibility that, by a concerted effort of the bench and of all branches of the legal profession, something might be done to reduce the number of decisions reported. Though, perhaps, little or nothing could be done to reduce the bulk of legislation, the fact that sets of annotated statutes have today reached an extraordinary

size is due very largely to the great number of decisions reported, with double and triple citations.

It was not very many years ago, the Chairman continued, that the bench and bars of most of the American states were adequately served by a two or three volume set of annotated statutes, while now sets of ten or more volumes are being used or projected. Digests of decisions of ever-increasing size are necessary to take care of the flood of reported cases. The cost of all of these is fast becoming prohibitive to the larger libraries, and lawyers and libraries taking only such publications from a single state will find in a time not far distant that they will be unable because of cost to secure them. The mere bulk of these essential tools has very nearly reached the point not only where they cannot readily be used but even if they could, the cost of buying them is too great.

Any attempt to deal with this situation, he said, must be by some organization representing the whole of the consumer interest, operating continuously over a period of years and working with the support of bar associations, both local and state, and in the closest contact with all branches of the legal profession.

After considerable discussion, the meeting resolved to recommend to the organizations there represented the formation of a permanent committee or body, composed of representatives of these organizations and of other organizations having similar interests, designed to study continually and to promote the interests in question.

It was further agreed that one of the first subjects for the consideration of such permanent committee should be the possibility of the progressive elimination of separate state court reports in favor of a single court reporting system.

Report of Attorney General Homer Cummings Points Out Defects in Administration of Justice and Proposes Remedies—Increase of Judicial Personnel and Improved Administration Advocated

"DELAY in the administration of Justice is still the outstanding defect of our Federal Judicial System," declares Attorney General Homer Cummings in his annual report for the past fiscal year. He lists the principal types of delay as follows:

"First—the gap between the date of filing of suit and the time that the case is in shape for trial, i. e., the date on which issue is joined by the filing of the final pleading. This period is protracted beyond all reason in almost every jurisdiction. It is the stage characterized by dilatory pleas, motions to dismiss, demurrers, and other technical proceedings. In many districts this defect is accentuated because matters of this kind are heard only once a month and sometimes only on the first day of the term. In places, and there are many, in which only one or two terms of court are held annually, the filing of a dilatory plea, a motion to dismiss or a demurrer may result in a postponement of the trial for at least 6 months or perhaps a year. I brought this situation to the notice of the Judicial Conference which announced in its report that 'this matter was considered by the Conference and will be taken up by the senior circuit judges with respect to each district within their circuits.' A further remedy lies in an increase of judicial personnel.

"Second—delay arises because of the time elapsing between joinder of issue (the date on which the final pleading is filed) and the earliest date on which the case can be reached for trial in due course, even if no attempt to postpone it is made by any of the parties thereto. Even when measured by this standard in 17 districts the trial dockets are in arrears. In three of them (the District of Columbia, the Eastern District of Michigan, and the Western District of Washington), the congestion is so severe that the time-lag is between 1 and 2 years. A table annexed to this report shows the length of this waiting period. This computation, of course, does not include the time consumed in the preliminary stages of the case prior to joinder of issue.

"We must not be misled by the statement that in the other districts the trial dockets are said to be 'current.' All that this means is that after the final pleading is filed in any case, the trial may be had at the next ensuing term of court, if the parties and the court cooperate. It does not follow, therefore, that in such districts the business is actually 'current' in any true sense, for the word 'current' does not take into account the time consumed during the preliminary period before the case is in shape for trial or the time lost between the time when a case may theoretically be tried and the time when it is actually tried; nor does it make any allowance for the fact that in many divisions and at many places of holding court, terms are convened but once or twice a year. The interval elapsing between terms of court may alone account for a delay of as much as a year between the time the case is in shape for trial and the earliest date upon which it can actually be heard. That this is an important factor may be deduced from the fact that sessions of the United States District Courts are held at 376 different places. At 115 of these places there is only one term a year, while at 242 of them there are only two terms annually. At only 19 places are there more than two terms a year. Ingenious counsel are frequently able to postpone actual trial despite the utmost efforts of adversary parties to bring matters to a hearing. Overworked judges are at a disadvantage in their efforts to drive forward the business of the courts.

"The existence of actual delay even in districts where the trial dockets are reported to be in a so-called current condition is conclusively demonstrated by the large number of pending cases that were filed more than 2 years ago and are still undisposed of.[1] For example, in New Jersey and in the western district of Wisconsin over 60 per cent of the pending cases are more than 2 years old, while in the northern district of Indiana and in the southern district of Illinois this is true of 59 per cent of the pending cases. In Delaware this is true of over 46 per cent of the cases; in Vermont of over 42 per cent; in the western district of Missouri of over 39 per cent; in Kansas of over 37 per cent; in the southern district of Alabama of over 32 per cent. Yet, in all of these districts the trial dockets are reported as being in a so-called 'current' state.

"Third—delay arises out of the intervals frequently elapsing between the final submission of a matter for judicial decision and the date upon which a decision is rendered. Some of the judges have called attention to this unfortunate situation and have asserted that the volume of business confronting them is so great and the time during which they are not actually sitting on the bench is so limited that they do not have adequate opportunity to study the cases or prepare their decisions. . . ."

The report states that the situation, as depicted, is manifestly inconsistent with any sound idea of judicial efficiency, and that it will remain until we make shift to remedy the conditions which have created it. The fault "does

1. These computations were made as of September 30, 1937.

not lie with individual judges. Almost without exception they are conscientious and hard-working." The defects are in the system and are due to (a) an insufficient personnel, (b) a tolerance of technicalities and lack of a unified simple and coherent system of procedure, and (c) lack of efficient administrative methods.

Referring to the first of these defects, the report states that the Attorney General not only regards the recommendations by the Judicial Conference for additional judgeships as "ample justified," but will be glad to submit to the appropriate committees of the Congress data bearing upon the propriety and wisdom of still further increases, as follows: One Associate Justice for the United States Court of Appeals for the District of Columbia, one District Judge for eastern and western districts of Arkansas, one District Judge for the northern district of California, one District Judge for the southern district of Florida or jointly for the northern and southern districts of Florida, one District Judge for the northern district of Illinois, one District Judge for the district of Massachusetts, one District Judge for the district of New Jersey, one District Judge for the southern district of New York, one District Judge for the eastern district of Pennsylvania, one District Judge for the eastern, middle and western districts of Tennessee, one District Judge for the western district of Virginia.

As to the second defect, the report states that "distinct progress has been made in the matter of eliminating technicalities and in coordinating the rules of practice." Reference is made to the Attorney General's support of the procedural reform which has just been accomplished by the Supreme Court. The report then takes up the need for a better machinery for administration of the courts. It says, in part:

"An efficacious administrative machinery is as necessary in the courts as it is in other branches of Government and in private enterprise. Individual judges must of necessity confine their time and energy principally to the transaction of judicial business. The senior circuit judges are occupied with their judicial labors and can give but scant time to the performance of administrative duties. The conference of senior circuit judges meets but once a year and continues in session only three days. It performs a valuable and useful function, but obviously it does not and cannot act as a continuous administrative body. It is highly desirable that provision be made for a permanent administrative officer, with adequate assistance, to devote his entire time to supervision of the administrative side of the courts; to studying and suggesting improvements in the matter of handling dockets; to assembling data and keeping abreast of the needs of the various districts for temporary assistance; and to ascertaining what judges are available for such assignments, as well as performing other incidental functions. Such an officer should be appointed by the Supreme Court and act under the supervision of the Chief Justice. It is interesting to note that the appointment of an officer of this kind was recommended in England in January, 1936, in a Report of the Royal Commission on the Despatch of Business at Common Law.

"I believe, too, that there is something inherently illogical in the present system of having the budget and expenditures of the courts and the individual judges under the jurisdiction of the Department of Justice. The courts should be an independent, coordinate branch of the Government in every proper sense of the term.

"Accordingly, I recommend legislation that would provide for the creation and maintenance of such an administrative system under the control and direction of the Supreme Court."

Washington Letter—Retirement of Associate Justice Sutherland and Appointment and Confirmation of Solicitor General Reed As His Successor—Bill for Additional Federal Judges—Propriety of Judicial Conduct, Etc.

January 25, 1938

Justice Sutherland Retires

THE retirement of Justice George Sutherland after more than fifteen years' service on the Supreme Court indicates the closing of the career of a very distinguished American jurist. His services to the nation, even before becoming a member of the highest court, were noteworthy. He was born in Buckinghamshire, England, and received his academic education in Utah, where he practiced law for many years. He was a member of Utah's first state legislature.

From 1901 to 1903 he was a member of the United States House of Representatives but declined renomination. He served twelve years in the Senate, from 1905 to 1917. He was President of the American Bar Association, 1916-17; and, in respect to the period of service, is the senior living former President of the Association. His law course was at the University of Michigan and he was awarded honorary degrees from a number of Universities. Upon his appointment to the Supreme Court, he was immediately confirmed by the Senate and entered upon the duties of his office October 2, 1922.

Hon. Stanley Reed Appointed to Supreme Court

The prompt confirmation of Solicitor General Stanley F. Reed, following his nomination to fill the position left on the Supreme Court by the retirement of Associate Justice Sutherland, will stand as a recognition of the high esteem in which he is held both by his friends and by his political opponents. A committee hearing was held but no objections were raised. The subcommittee and also the Senate Judiciary Committee returned unanimously favorable reports. His recent victories in prominent Supreme Court battles are too well known to need recapitulation here. It is sufficient to note that he is credited with winning seven out of nine major cases.

Justice Stanley Reed was born in Mason County, Kentucky, December 31, 1884. He received his academic education at Yale, being graduated as a member of the class of 1906, and was a winner of the Bennett Prize for American History. He studied law at the University of Virginia and at Columbia, and also studied at the University of Paris in 1909-10. He was in the general practice in Kentucky from 1909-1929, during which time he had a wide experience in farm cooperatives, labor legislation, banking and corporations. He took part in the organization of and acted as counsel for the Burley Tobacco Growers Cooperative Association, which covered five states, from 1920 to 1929. He was a member of the General Assembly of Kentucky from 1912-1916, where he introduced and sponsored a child labor act.

In 1929 President Hoover called him to Washington to be General Counsel for the Federal Farm Board, in which position he served until 1932. In that year he was appointed General Counsel of the Reconstruction Finance Corporation, continuing in that position until March, 1935, when President Roosevelt appointed him Solicitor General. His successful record in that important position is well known.

Justice Reed has been a member of the American Bar Association since

1929, and served as a member of the House of Delegates of that organization. He is also a member of the Kentucky State Bar Association, American Law Institute, American Legion, Executive Committee of the American Red Cross, and of the Federal Board of Hospitalization.

During the past few years he has made addresses on constitutional topics before the Bar Associations of Ohio, Kentucky, Tennessee, Virginia, Maryland, New York and Georgia; before the Institute of Public Affairs, the Chautauqua Institute, National Radio Forum, Town Meeting of the Air, and in other places.

A key to a part of his legal philosophy is said to lie in these words quoted from him: "Experience of the last half century has driven us to the realization that, after all, we live in a factual world where organized groups, whether for production, commerce or propaganda, are too powerful to permit the feeble forces of the individual to survive. . . . Regretfully but inevitably we must adjust our lives and our Government to modern needs and find, in a Constitution written for a simpler era, guidance for the problems of our present age."

Changing Amendment Procedure

The question of changing the method of amending the Constitution is brought to the front at this time by hearings on January 26th before a subcommittee of the Senate Judiciary Committee on Senate Joint Resolution 134, introduced in April, 1937, by Senator Norris. The subcommittee consists of Senators Norris, of Nebraska; Hatch, of New Mexico; Pittman, of Nevada; Connally, of Texas, and Austin, of Vermont.

According to its title, the resolution is proposing an amendment to the Constitution of the United States relative to the ratification of constitutional amendments by popular vote. If it should be adopted, constitutional amendments not only would be passed upon by the states through a plebiscite but would require approval of only 32 states, or two-thirds, instead of 36, or three-fourths of the states, as now, in order to be ratified.

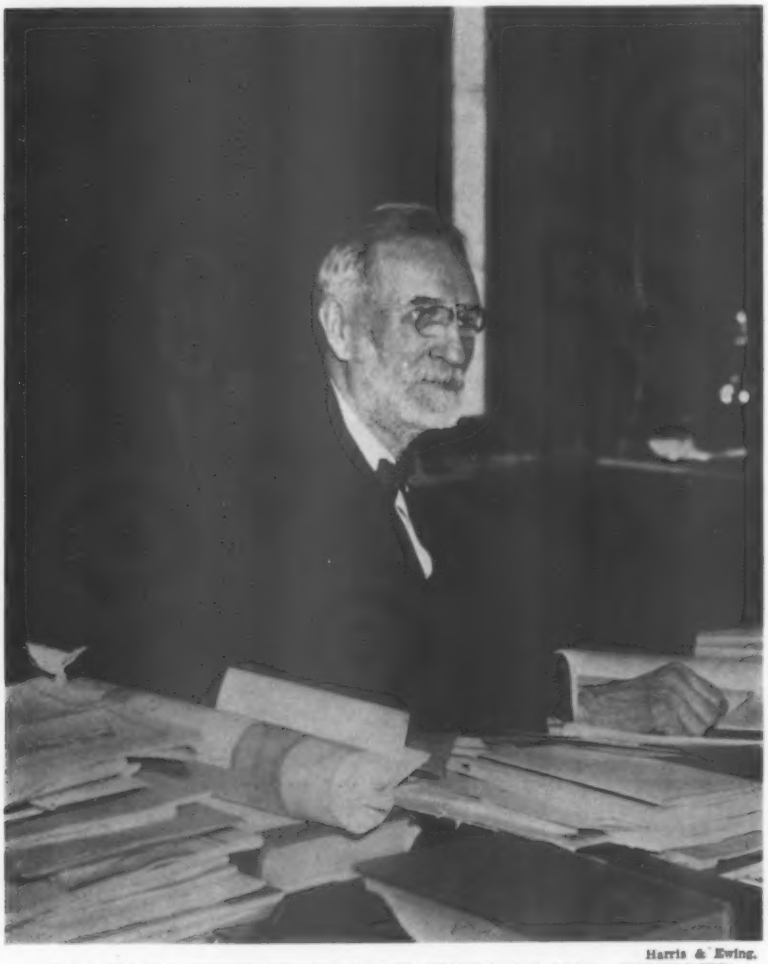
Extension of F. T. C.'s Authority

There is a prospect that the authority of the Federal Trade Commission will be extended to include all deceptive practices involved in interstate commerce, instead of merely where such practices have to do with competition. When S. 1077 was before the House, where it passed with certain amendments, Representative Crosser, of Ohio, in explaining the addition of the words "unfair trade practices," regardless of whether there is competition involved, stated that "There may be a monopoly of the worst kind which involves no competition whatsoever, yet the law as it stands today would not allow the Federal Trade Commission to make an investigation and stop those practices which are admittedly not in the public interest."

This bill to amend the act creating the Federal Trade Commission and to define its powers was laid before the Senate, in the form amended by the House, by Senator Wheeler during the filibuster on the anti-lynching bill; and then, apparently for tactical or procedural reasons, was withdrawn by him with the suggestion that he would bring it up later. While thus temporarily before the Senate, it met the resistance of Senator Copeland because, he contended, it would conflict with his Food and Drug Bill in respect to which he believes control of advertising should be in the Food and Drug Administration of the Department of Agriculture. At the present time jurisdiction of the Food and Drug Administration is limited to matters of labeling and adulteration. While the Federal Trade Commission heretofore has not had authority except where competition was involved, nevertheless it will be recalled that the Supreme Court ruled it was not necessary to show actual deception of a competitor but that it was sufficient if the practice was misleading the public.

Would Codify Revenue Laws

The first recommendation of the subcommittee of the Committee on Ways and Means of the House of Representatives in respect to current internal revenue legislation is that the laws thereon be codified. The subcommittee, in its report to the Committee, mentioned recent editions of the revenue laws, concluding with that of 1933 which, with certain modifications, was substituted for title 26 of the United States Code which in its present form is only prima facie law and, not being absolute law, cannot be relied upon, making it "still necessary to go to the many volumes



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ASSOCIATE JUSTICE GEORGE SUTHERLAND, RETIRED

of the Statutes at Large to determine what the law actually is."

The subcommittee's report continued: "The only practical way to insure the certainty of determining what is actually the law is to have the code of internal revenue laws enacted into absolute law in a manner similar to that by which the Revised Statutes of 1873 were enacted. With this end in view the staff of the Joint Committee on Internal Revenue Taxation with the cooperation and assistance of the Treasury Department has been engaged in giving the codification thorough scrutiny and review and is bringing it up to date to take into account legislation enacted since July 1, 1932. This work was started during the summer recess and is now in the final stage of completion. Your subcommittee, therefore, is of the opinion that it is important to enact this codification into absolute law as soon as possible after its publication. . . ."

Under-Secretary Roswell Magill endorsed the recommendations of the subcommittee when he appeared before the Ways and Means Committee and also said that further improvements should be made in the tax laws. The high points of his testimony before the Committee, which indicate the course internal revenue legislation is likely to take—some of which follow closely the subcommittee's recommendations—are:

The Treasury Department's recommendation was renewed for an amendment to the Constitution under which future issues of Federal, State, and municipal securities would be subjected to income taxes just as are other obligations.

He explained that, after thorough review, it had been concluded "there was no convincing evidence" that either the undistributed profits tax or the tax or capital gains had been "a major factor in the business recession."

The subcommittee believed that some of the revenue lost by relief provisions which would operate in favor of individuals could be properly made up by reducing exemptions from estate and gift taxes.

The Treasury is considering as a possibility the combining of the estate and gift taxes "so that all transfers of property by an individual will be taken into account in computing the applicable taxes and one set of rates will be provided throughout."

It was believed the revenue system as a whole would be improved if the excise taxes, imposed in 1932 on commodities in common use, should be eliminated gradually and the revenue thus lost made up, if necessary, by increasing the income and estate taxes. To this end, the subcommittee had proposed elimination of ten of the less desirable of these taxes which produce somewhat more than $25,000,000. It was hoped "that it will be possible to eliminate additional excise taxes in the next few years as budgetary conditions improve."

Harris & Ewing.

ASSOCIATE JUSTICE STANLEY F. REED

It was early decided that it would be "unwise to accede to the pressure for retroactive legislation" since, if a new tax program were made effective as of January 1, 1937, it would have "an unsettling effect upon business" because taxpayers had completed their plans in light of the existing revenue laws.

It was believed that the rates of taxes on small-income corporations properly might be lower than those on corporations of large income "unless it be desired to make impractical or impossible the use of the corporation by persons with incomes of less than $45,000."

A special surtax was recommended on corporations controlled by small groups of individuals. This was justified on the ground that individuals whose incomes exceed $57,000 now are charged an effective rate of tax in excess of 20 per cent, which is the maximum corporate tax rate now proposed.

There is little to recommend the capital stock and excess profits taxes except their return of an assured revenue of $150,000,000, it having been concluded to be undesirable to increase the normal corporation tax sufficient to make up this amount, after seriously considering repeal of the former two taxes.

Subjects on which later recommendations may be made to Congress by the Treasury Department are methods for integrating the Federal and State taxing systems and elimination of overlapping of taxes in certain instances.

Additional Judicial Services

The bill to effectuate the recommendation of the Judicial Conference, as supplemented by the recommendation of the Attorney General, was introduced by Senators Ashurst and

(*Continued on page* 167)

SUPREME COURT ADOPTS RULES FOR CIVIL PROCEDURE IN FEDERAL DISTRICT COURTS

Great Task Accomplished through Enthusiastic Cooperation of Bench and Bar of Entire Country—Court's Bold Decision to Deal with Entire Problem and to Unite Rules for Cases in Equity with Those for Actions at Law, So as to Provide One Form of Civil Procedure for Both, Stirs Imagination of Profession and Stamps Undertaking as Great Reform—Advisory Committee Appointed to Assist Court Labors over Two Years to Perfect Draft in Light of All Available Suggestions from Bench and Bar—Rules Transmitted to Congress by Attorney General Cummings to Whose Powerful Support the Passage of Favorable Legislation in 1934 Was Largely Due—Successful Culmination of Movement Instituted by American Bar Association in 1912—Brief History of Its Long Years of Struggle for Procedural Reform.

THE Supreme Court of the United States, proceeding under authority of the Act of Congress approved June 19, 1934, has adopted and transmitted to the Attorney General the rules to govern civil procedure in the District Courts of the United States. On January 3 the Atorney General transmitted them to Congress, where they were referred to the Judiciary Committees of the Senate and House.

The rules were drafted with the assistance of an Advisory Committee and with the enthusiastic cooperation of the Bench and Bar. No such instance of the cooperation of a whole profession in an undertaking of this kind is afforded by the history of this or any other country. And the reason for that whole-hearted and enthusiastic cooperation is largely found in the bold fashion in which the Supreme Court met the situation. It did not confine itself to the more limited authority contained in Section 1 of the Act but grappled decisively with the whole problem. It announced its decision to unite the rules for cases in equity with those in actions at law, "so as to secure one form of civil action and procedure for both," as authorized in Section 2. This bold decision stirred the imaginations of men, and made all feel that they were taking a part in a magnificent enterprise for procedural reform.

It was peculiarly appropriate, apart from the provisions of the Act, that the rules should be transmitted to Congress by the Attorney General. It was unquestionably due to his powerful support that the Act was passed and that this great reform in procedure was made possible at this time. But behind the Attorney General's endorsement and support of the plan and its successful realization in the rules just adopted there lies a long period of Association effort. This began in 1912, when the original committee on Uniform Judicial Procedure was appointed, with Thomas W. Shelton, of Norfolk, Virginia, as chairman.

A Lesson in Cooperation

Truly the successful culmination of the long struggle emphasizes the lessons drawn by Chairman Vanderbilt, who presided over the Open Forum discussion of the proposed rules at the meeting in Boston in October, 1936. "The first lesson," he said, "to be learned from the history of the movement is that we should never be discouraged in our efforts to promote the improvement of justice, and the second is of the advantage and the results that may be obtained by wholehearted cooperation. Here we find this work, which was initiated by the American Bar Association, carried on by cooperation of the Executive Department through the Attorney General, carried on by the Legislative Department through cooperation of the Judiciary Committees in Congress, carried on still further through the cooperation of the Supreme Court by the appointment of a distinguished committee to work on this task, and carried on still further by the cooperation in the several Federal circuits and the various districts of the United States, with the result that practically every lawyer who has had any thought on the subject has had an opportunity to be heard."

The last phase of the movement began with the adoption of the Act of 1934. It contained two sections, the first authorizing the court to prescribe general rules of practice and procedure for civil actions at law in the District Courts of the United States and for the District of Columbia, and the second authorizing the Supreme Court, in its discretion, to unite the rules for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. This was followed by an order of the Supreme Court announcing that, pursuant to Section 2 of the Act, the Court would undertake "the preparation of a unified system of general rules for cases in equity and actions at law in the district courts of the United States and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the 7th amendment of the Constitution of the United States and without altering substantive rights."

Supreme Court Appoints Advisory Committee

The order then stated that to assist the Court in its undertaking it appointed the following Advisory Committee to serve without compensation: William D. Mitchell, of New York City, Chairman; Scott M. Loftin, of Jacksonville, Florida, President of the American Bar Association; George W. Wickersham, of New York City, President of the American Law Institute; Wilbur H. Cherry, of Minneapolis, Minnesota, Professor of Law at the University of Minnesota; Charles E. Clark, of New Haven, Connecticut, Dean of the Law School of Yale University; Armistead M. Dobie, of

University, Virginia, Dean of the Law School of the University of Virginia; Robert G. Dodge, of Boston, Massachusetts; George Donworth, of Seattle, Washington; Joseph G. Gamble, of Des Moines, Iowa; Monte M. Lemann, of New Orleans, Louisiana; Edmund M. Morgan, of Cambridge, Massachusetts, Professor of Law at Harvard University; Warren Olney, Jr., of San Francisco, California; Edson R. Sunderland, of Ann Arbor, Michigan, Professor of Law at the University of Michigan; Edgar B. Tolman, of Chicago, Illinois.

The duty of the Advisory Committee was stated to be, subject to the instructions of the court, to prepare and submit a draft of a unified system of rules as above described. This Committee met at Chicago in the court room of the Circuit Court of Appeals in the Federal Building, on June 20, 1935, and organized and discussed its method of procedure. From that time until the completion of its task in December, 1937, the Committee was engaged in this important task.

The first step was to devise a plan which would enlist the widest possible cooperation on the part of the Bench and Bar of the nation. Local committees of the bar were appointed by Federal judges in all the districts and suggestions were asked from all lawyers who were interested in the subject. The studies of the Committee, supplemented by the assistance rendered by the Bench and Bar of the country, resulted in the adoption in the following year of a preliminary draft, which was submitted to the committees for further study and suggestions.

Preliminary Draft Discussed in "Open Forum"

At the meeting of the American Bar Association in Boston in 1936, there was an Open Forum at which the proposed rules of civil procedure, as embodied in the preliminary draft, were discussed. Hon. William D. Mitchell, Chairman of the Committee, pointed out that while this draft contained much that was new to many, it contained no proposal that had not had an actual trial in some jurisdiction. Two great steps in advance were assured by the proposed rules: The first was the adoption of the principle that rules of pleading and practice should be made by the courts and not by statute, and the second was the proposed abolition of distinctions in forms of pleading and procedure between actions at law and suits in equity. He then took up the draft and pointed out some of the principal difficult problems confronting the Advisory Committee, asked the assistance of the Bar, and declared that the opportunity now presented itself to the lawyers of the country to accomplish a reform in practice and procedure that would stand out as an important accomplishment of our generation.

Edgar Bronson Tolman, Secretary of the Advisory Committee, after dealing with the historical aspects of the procedural reform movement in this country, pointed out the principles to be observed in making rules, and Charles E. Clark, Reporter for the Advisory Committee, declared that a striking feature of the new Federal rules is that this reform of law administration was initiated and is now on its way to completion through the organized efforts of the lawyers themselves.

Further Meetings of Advisory Committee Consider Suggestions

Further meetings of the Advisory Committee were held later at which the many suggestions from committees and others were given due consideration and embodied in a further draft. This revised draft was presented to the Supreme Court in April, 1937, and later formed the subject of another Open Forum at the annual meeting at Kansas City. Chairman Mitchell there announced that the draft had been submitted to the Supreme Court and distributed to the bar. The Advisory Committee, he said, would hold a meeting around November 1, at which it would prepare a supplementary report to the Court recommending such changes in the draft of April, 1937, as might be agreed on, in the light of suggestions from the Bench and Bar and as a result of the Committee's efforts to improve the draft. He pointed out that the next thirty days offered the last chance for members of the profession to submit suggestions as to the forms of the rules—an opportunity of which the profession proceeded to avail itself, as subsequent events showed. Secretary Edgar B. Tolman, at the same Open Forum, spoke of the origin of the conformity idea, its development, the failure of that experiment and the cure for the evils resulting from it, and Charles E. Clark, Reporter for the Advisory Committee, spoke of the underlying philosophy embodied in some of the basic provisions of the new procedure—particularly those dealing with generality of allegation and the free joinder of claims and parties.

The program for the final activities of the Advistory Committee, as indicated by Chairman Mitchell, was duly carried out, various changes were made and in December the result was submitted to the Supreme Court. After further consideration the Court, on December 20, transmitted the rules to the Attorney General with the request to report them to Congress at the beginning of the regular session in January, as provided in Section 2 of the Act of June 19, 1934. The letter of submittal, signed by Chief Justice Hughes, stated: "I am requested to state that Mr. Justice Brandeis does not approve of the adoption of the rules." In accordance with this request, Attorney General Cummings transmitted the rules to Congress, where they were received and referred to the Judiciary Committees of the House and Senate.

Court Enters Order Expressing Appreciation of Committee's Work

On January 17, the Court entered an order expressing its appreciation of the work of the Advisory Committee. After reciting the original appointments the order stated that "following the death of George W. Wickersham, the Court, on February 17, 1936, appointed George Wharton Pepper, of Philadelphia, Pennsylvania, in his stead, and Mr. Pepper succeeded Mr. Wickersham as Vice Chairman of the Committee." It continued:

"The Committee at once organized and for about two years and a half its members devoted themselves to the task assigned them. Apart from the work of the reporter of the Commitee, and of those who gave special assistance in drafting, the members served without compensation. They held frequent and protracted meetings and prepared tentative drafts which were submitted to Federal Judges, to committees of lawyers appointed in various Judicial Districts, and to associations of the Bar. These drafts had a wide circulation and a large number of lawyers and judges availed themselves of the opportunity to offer criticisms and suggestions.

"The Committee submitted its final draft to this Court in November last, and the Court after considering the draft and making such changes as were deemed advisable transmitted the rules to the Attor-

ney General of the United States for submission to Congress as provided in the statute. The Court is informed that the Attorney General submitted the rules accordingly at the opening of the present session of Congress.

"The Court expresses its high appreciation of the services of the membership of the Advisory Committee who at great personal sacrifice have performed a most important public duty and by their expert knowledge and painstaking collaboration have aided the Court in the formulation of a system of rules designed to promote the simplification of procedure in the Federal Courts and thus to increase the efficiency of the administration of justice.

"The Court directs that this expression be spread upon the Journal of the Court and that a copy be sent to each member of the Committee."

The Long Years Before the Final Triumph

All this is the story of ultimate triumph, but the many years which preceded it furnish a record of effort no less inspiring. As one looks through the Reports of the American Bar Association from 1912 on, the struggle to secure a better system of civil procedure, in the face of difficulties and discouragements, runs like a major theme. Secretary Tolman, in his address at the Open Forum in Boston, ascribed the origin of the movement in large part to Roscoe Pound who, in an address before the American Bar Association in 1906, raised the "first clear voice" in this country to analyze the defects in our administration of Justice and thus pointed the way to needed reforms. In that address Dean Pound particularly pointed out the importance of rules of court as a means of dealing with the situation.

Thomas W. Shelton, of Norfolk, Virginia, was the first chairman of the Committee on Uniform Judicial Procedure, and he should be named first in the long list of those who distinguished themselves by persistent devotion to the great cause. The committee was created at the Milwaukee meeting, under the presidency of S. S. Gregory. At that meeting the Committee on Judicial Administration and Remedial Procedure reported that the Executive Committee, on January 4, 1912, had referred to it a resolution presented by Mr. Thomas W. Shelton. The committee somewhat plaintively inquired why the Executive Committee should refer to another committee of the Association a matter which had been brought to its own attention, but concluded by stating that it was in favor of the Shelton resolution.

"The subject-matter of the resolution," it said, "is one of great importance. It is true that Section 914 of the Revised Statutes has failed to bring about any uniformity in proceedings in civil cases. It is true that uniformity in this respect is most desirable; and the inference drawn from the resolutions seems to your committee justifiable, namely: That if a complete uniform system of law, pleading and procedure should prevail in the Federal courts—a system carefully modeled by the Supreme Court of the United States—it would in time induce the several states to adapt their own systems of pleading to such model."

The Resolution Which Marked the Beginning of the Struggle

The Shelton resolution, which marked the real beginning of the organized effort to secure the reform was as follows:

"WHEREAS, Section 914 of the Revised Statutes has utterly failed to bring about a general uniformity in federal and state proceedings in civil cases; and

"WHEREAS, It is believed that the advantages of state remedies can be better obtained by a permanent uniform system, with the necessary rules of practice prepared by the United States Supreme Court;

"Now, therefore, be it and it is hereby resolved:

"First: That a complete uniform system of law pleading should prevail in the federal and state courts:

"Second: That a system for use in the federal courts, and as a model, with all necessary rules of practice or provisions therefor, should be prepared and put into effect by the Supreme Court of the United States;

"Third: That to this end, Sec. 914 and all other conflicting provisions of the Revised Statutes should be repealed and appropriate statutes enacted:

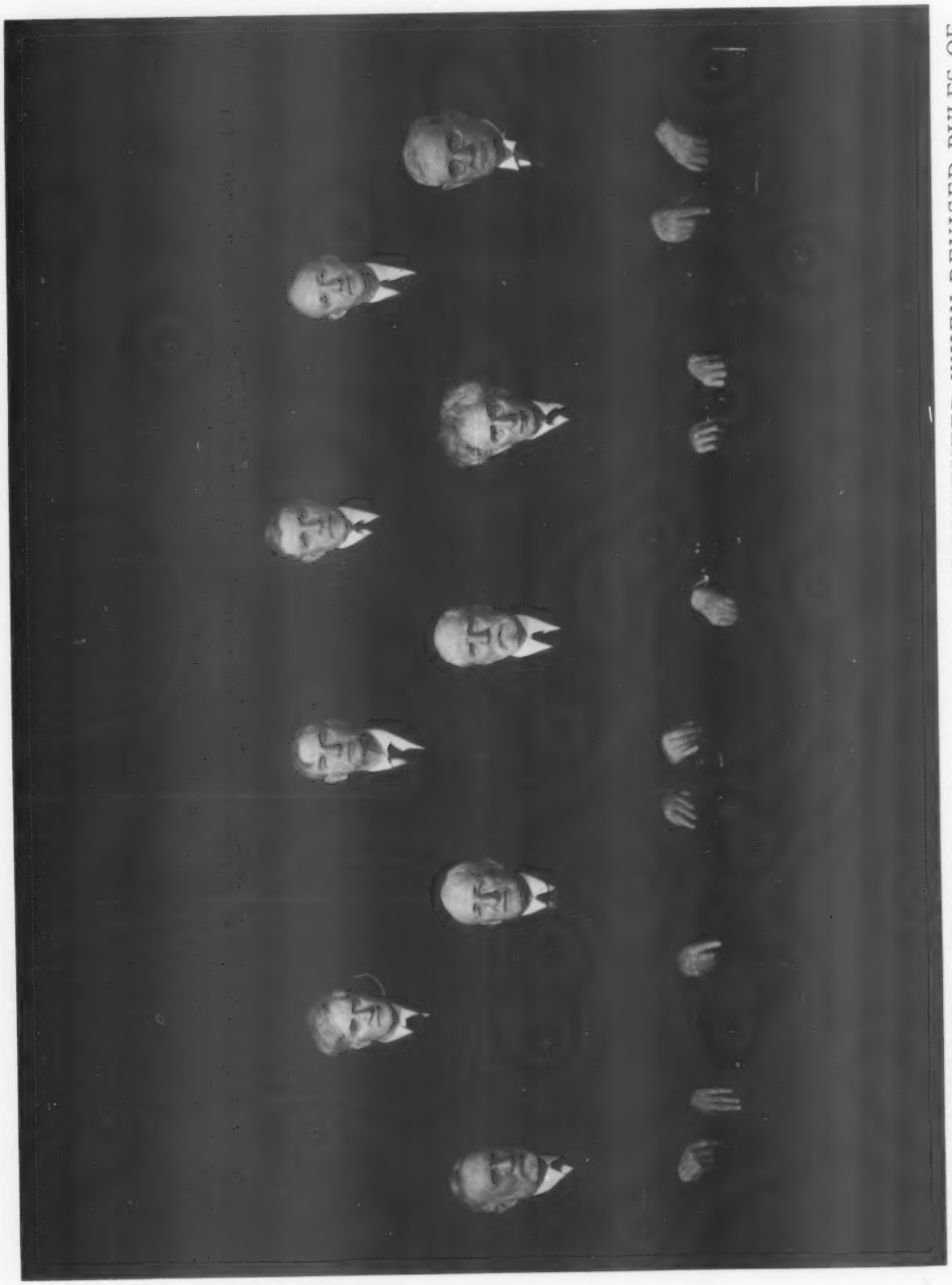
"Fourth: That for the purpose of presenting these resolutions to Congress and otherwise advocating the same in every legitimate manner, there shall be appointed a committee of five members to be selected by the President to be known as 'The Committee on Uniform Judicial Procedure.'"

THE LATE THOMAS W. SHELTON

The report was approved and the following committee was appointed: Thomas W. Shelton, Norfolk, Virginia, Chairman; J. M. Dickinson, Nashville, Tennessee; William B. Hornblower, New York; Louis D. Brandeis, Boston, Massachusetts; Joseph N. Teal, Portland, Oregon. The appointments were made by Hon. Frank B. Kellogg, who succeeded President Gregory, and who from that time on was one of the most earnest advocates of the plan. Several years later as a Senator he assumed charge of the bill in the Senate.

"Clayton Bill" Introduced in Sixty-second Congress

The bill embodying the idea was prepared with the advice and assistance of Judge Henry D. Clayton, Chairman of the Judiciary Committee of the House of



THE SUPREME COURT OF THE UNITED STATES AS CONSTITUTED WHEN REVISED RULES OF CIVIL PROCEDURE FOR FEDERAL DISTRICT COURTS WERE ADOPTED (Harris & Ewing)

Representatives, and by him introduced in the Sixty-Second Congress on December 2, 1912, as House Bill No. 26462. Chairman Shelton reported to the Montreal meeting, in 1913, that the bill was favorably endorsed and supported by ex-President Taft, Vice-President Marshall and Attorney General McReynolds, over forty of the Governors of States, by the Conference of Commissioners on Uniform State Laws, by the National Civic Federation, the Executive Committee of the American Association of Law Schools, the Bar Associations of Massachusetts, Alabama, Oregon, Maryland and Mississippi, "and many others." He cited as supporters of the plan among the law teachers, Dr. Henry Wade Rogers, Dean Roscoe Pound, Dean William M. Lile, and Dean William R. Vance. Chairman Shelton also stated that the committee had been active in setting forth the merits of the bill and in urging on Congress the necessity for prompt action. Here follows a note of the unquenchable optimism which carried Mr. Shelton through so many years of struggle and successive disappointments: "It is intended that it [the committee] shall continue after Congress and the Supreme Court have acted, for the useful purpose of bringing about the adoption of the new Federal system in their respective States."

However, the Chairman was compelled to state that the enactment of the bill by the Sixty-second Congress had been frustrated by an impeachment proceeding (Judge Archbald) which took up the greater part of the time and thought of the Judiciary Committee of the House, so that Congress adjourned March 4, 1913, without even a hearing before that Committee. But promptly on convening of the extra session, he went on, on April 10, 1913, Judge Clayton again introduced the measure as House Bill 133 and Senator Charles H. Culberson, Chairman of the Senate Judiciary Committee, introduced the measure in that body. "The history of the extra session of Congress and its devotion to two prominent issues being fresh in mind, it is hardly necessary to make explanation or apology for lack of success."

Still Cherishing "the Unalterable Hope"

Again the optimistic note in the same report. The Chairman stated that arrangements had been perfected for introduction of the bill immediately on reconvening of the next session and for a hearing by the two Judiciary Committees immediately thereafter. It could easily become a law before the adjournment for the Christmas holidays, he added, "unless there arises some unexpected or unforseen lukewarmness or opposition." And supplementing the written report, he said: "I feel sure that with the support the committee has received from the President of the United States and from the Attorney General and from ex-President Taft there will be no difficulty about its passage at the next session of Congress."

For many years thereafter the record was about the same: bright prospects, disappointments, and persistence in the face of them. In 1914, according to Chairman Shelton's report, Hon. William Howard Taft, Senator Elihu Root, Alton B. Parker, Professor DeWitt Andrews, and the Chairman of the Committee appeared before the Judiciary Committee of the House, which reported unanimously in favor of the Clayton bill, but nothing came of it. In 1915 the bill was reported by the Judiciary Committee of the House, with amendments, and ordered printed—the report being unanimously adopted by the Committee. The House Bill, offered by Chairman Webb, was referred to a special sub-committee of the Senate, composed of Senators O'Gorman and Root of New York and Walsh of Montana, and Chairman Shelton said there was reason to believe the subcommittee would report to the whole committee the same day, but "it never has reported." The name of Senator Walsh will be noted as a member of the subcommittee and his name occurred quite frequently in the reports from that time on, as a strong influence in opposition.

Senator Sutherland of Utah Secures Favorable Report

However Chairman Shelton was not discouraged. "We have in writing the committal of a majority of

THE "CLAYTON BILL," H.B. 26,462, INTRODUCED IN THE HOUSE BY HON. HENRY D. CLAYTON ON DEC. 2, 1912.

"A BILL

"To Authorize the Supreme Court to Prescribe Forms and Rules and Generally to Regulate Pleading, Procedure and Practice on the Common Law Side of the Federal Courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court shall have the power to prescribe, from time to time and in any manner, the forms and manner of service of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving process of all kinds; of taking and obtaining evidence; drawing up, entering, and enrolling orders; and generally to regulate and prescribe by rule the forms for the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law of whatever nature by the district courts of the United States."

THE ACT OF JUNE 19, 1934, CH. 651

Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. [Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U. S. C. Title 28, §§ 723b, 723c.]

the members of the Senate and House. . . . Unless there shall again arise in the next Congress that peculiar thing which is called 'Senatorial courtesy' which seems able to defeat a majority, the bill is going to pass," he declared. In 1916, at the Chicago meeting, the Chairman jubilantly announced that he had received word that since the meeting had been in session the Senate had passed the bill, and a subsequent telegram said the House had done the same thing. But the report was a mistake, as the Chairman sadly announced in 1917 at the meeting at Saratoga Springs. When the Chairman got there [Washington] to arrange for the ceremonial signing of the bill, he said, "it transpired that the wrong bill had been enacted. Although the most earnest efforts were made in that behalf, it was then too late to correct the error before final adjournment immediately following." The report for that year stated that at the second session of the Sixty-fourth Congress the bill was favorably reported out of the Senate committee, but "obstructive measures on the floor of the Senate, then possible" prevented its passage before the final adjournment on March 4, 1917. This favorable report had been secured under the leadership of Senator George Sutherland of Utah.

In 1918 Chairman Shelton appealed for help in Washington to get the bill reported out of the Senate Committee and contributed this epigrammatic statement to the literature of the campaign: "Somebody has asked whether it will interfere with war work. The answer is that it will help. Justice as well as liberty must prevail in America." In 1919, still no success: "A few hostile members of the Senate Judiciary Committee remained able to prevent a report by that body." However, Hon. Frank B. Kellogg had consented to take charge of the bill and do what he could to get it passed. In 1920 and 1921 the legislative situation was unchanged. Senator Richard B. Ernst had agreed to become the "patron of the bill," aided by Senators Kellogg, Selden P. Spencer, Miles Poindexter and others. In 1922 the situation was about the same. Two or three Senators had been able to control legislation concerning the matter and had absolutely prevented a report from being made from the Judiciary Committee of the Senate. The report stated that the Executive Committee of the Association, at its mid-winter meeting, had passed a resolution requesting the Senate Judiciary Committee to make a report on the Kellogg bill, declaring that "it was only common justice" that the membership of the Senate be given an opportunity to register their votes on the same. A hearing was held before a subcommittee, at which Senator Walsh opposed the bill "because of the inconvenience" a change in pleading and procedure would cause to lawyers.

Senators Overwhelmingly Support Bill—in Questionnaire

In 1923 the legislative situation, as far as the Judiciary Committee was concerned, was the same. As to the general body of Senators, a questionnaire had been sent out to them and 87 Senators had replied that they were willing to vote for the bill. In addition, every Circuit Judge in the United States, except three, and all but eight district judges favored it. But "personal influence" had been powerful enough to suppress the report. The importance of the aid of secular press in support of the measure was emphasized. In 1924 the Committee recommended that such State Bar Associations as have not already done so be respectfully requested to create State committees with a central chairman and a member from each congressional district to cooperate with the committee in bringing influence to bear on Senators and Representatives. Again the value of the support of the secular press was emphasized. In 1925, at the Detroit meeting, the report produced another good epigram: "The President can hold a bill but ten days, while a committee can hold it forever." The attitude of the Judiciary Committee should be combated by righteous public resentment, which, however, required organization to be effective. In 1926 the original bill was not introduced at the session of Congress because Senator Cummins had recommended a form favorably reported by the sub-committee. Section 2 appears in the Cummins' draft, giving the Court authority to combine the rules for cases in equity with those in actions in law so as to secure one form of civil action and procedure for both.

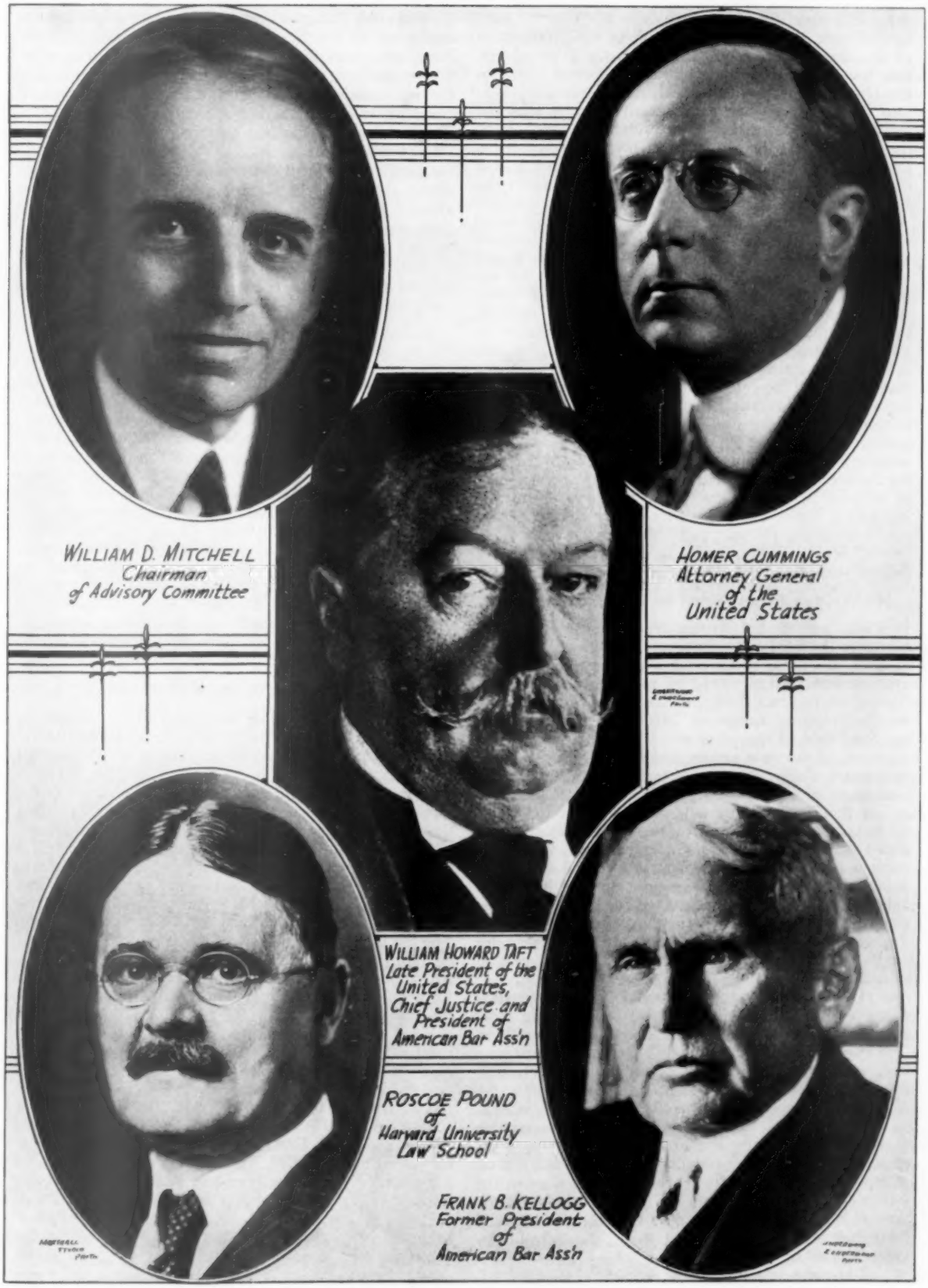
In 1927 "marked progress" was reported as to the last session of Congress. The bill was eventually reported out of the Senate Judiciary Committee, but a vote was not reached during the short session. Recommendations for active interest on the part of the Bar were renewed, the arguments for the bill were reiterated, and the appendix giving numerous instances of the failure of "conformity" and other material which had been printed in various previous volumes was repeated. In 1928 the committee reported at Seattle that the Senate sub-committee of the Judiciary Committee of the Senate had reported favorably on the bill but it could not be gotten out of the whole committee. Senator Cummins had died and Senator Sackett of Kentucky had succeeded him as "patron of the bill." Senator Deneen of Illinois took charge of the bill in the Committee, and an adverse report finally was made to the Senate. Senator Walsh prepared the majority and Senator Deneen the minority report, but no action was taken by that body.

Change of Tactics Adopted by Association

In 1929 Chairman Shelton withdrew as Chairman of the Committee and Nathan William MacChesney, of Chicago, took his place. The long effort to secure results by general agitation over the country, as well as by direct appeals to Senators and Congressmen, had been going on for many years and the goal seemed as far off as ever. There was no indication that a campaign conducted along the lines which had been followed would secure better results. It occurred to many that the movement was apparently up against a stone wall and that perhaps a withdrawal of pressure and cessation of general agitation might improve the situation.

The report in 1930 stated that it had seemed wise, in view of the present situation in the Senate Judiciary Committee to which the matter was referred, as well as the present political situation in the Senate, to cease to press the bill by general agitation all over the country, but to have it introduced, keep in touch with it, put the American Bar Association back of it and keep it in the minds of the Senate and the bar, so that at an appropriate time, when favorable action seemed likely, some action could be taken. The report added that so far as could be ascertained the likelihood of passage seemed less at this particular session than ever before.

In 1931 Chairman MacChesney reported the death of former Chairman Thomas W. Shelton and paid a tribute to him for his work. The situation in the Senate was still unfavorable for pressing the meas-



SOME OF THE LEADERS IN LONG STRUGGLE FOR REFORM IN PROCEDURE

ure. However, the Committee believed "that the sentiment over the country in favor of simplified rules of practice and procedure everywhere is growing and that the proposed authority for the Supreme Court of the United States is in line with this movement. It is also the belief of your Committee, however, that the legislation proposed by your Committee cannot be hurried, but that the sentiment in favor of it will grow gradually and its adoption came about as a result of a changed conviction and a change of leadership in the Senate."

In 1932 there was a new Chairman of the Committee, Hon. George W. McClintic, of West Virginia, and he reported a resolution to the meeting at Washington, D. C., as follows: "That in view of the apparent sentiment in the Senate of the United States and in the House of Representatives against any bill vesting in the Supreme Court of the United States the power to prescribe by general rules the practice and procedure in actions at law corresponding to the power that that court now has on the equity side, in bankruptcy and admiralty, it is recommended that no attempt be made by the Association to have such bill passed at this time." The report added that "some members of the Committee, at least, think it better for the American Bar Association at this time not to agitate or attempt to procure the passage of any affirmative legislation, but to exercise all its power to stop legislation attempting to take away the jurisdiction of the federal courts and attempts to limit the exercise of federal jurisdiction which the courts now have."

No Written Report Filed by Committee in 1933

This was the last written report filed by the Committee on Judicial Procedure, and neither the members at large nor those in attendance had any notice whatever of what action would be proposed at the forthcoming meeting, which happened to be at Grand Rapids. At that meeting Chairman McClintic stated that he regretted that in the pressure of judicial work he had neglected to write a report and have it printed. He then stated that he was of the opinion that the Judiciary Committee of the Senate was still opposed to the passage of the law and that a large number of the Committee of the House was of the same opinion. He added that "as far as we know and believe, we do not think it is necessary to keep up this special committee unless there is more sentiment for it [the bill] than I have been able to find among the States and the members of the committees of the two houses." Further on and in conclusion he said, "In my opinion we ought to drop this committee and let that question alone."

It has been erroneously stated in some quarters that the American Bar Association by its action there abandoned its effort for the adoption of this reform. The Association, as a matter of fact, at this meeting took no action whatever. It had always been customary for the report of a special committee which desired to be continued to contain a recommendation to that effect and for the chairman of the committee to present this recommendation. The chairman presented no such recommendation; in fact, called for no action whatever and nothing whatever was done at the meeting. Chairman Chester I. Long stated that in the absence of a motion to continue the committee it would lapse and, no such motion being made, the special committee ceased to exist.

It is quite safe to say that few of those in attendance at this particular session realized the situation or, if they did, imagined that the failure of a special committee to ask its own continuance meant that the Association was abandoning the efforts of two decades. Those members who were familiar with the methods of the organization knew that the Executive Committee could easily create another special committee, to press the matter at any moment that the legislative situation offered possibilities of success. No doubt, for various reasons, among them the recommendation of the committee reports at the three previous meetings, that no attempt be made to press the matter "at this time," there was a general acceptance of the idea that it might be well to pursue a waiting policy until things began to look better, and under those circumstances there seemed no particular reason in continuing the special committee.

Association Abandoned Its Tactics but Never the Plan

It is worth reiterating for the sake of the record that at no time did the Association abandon the plan for which it had struggled so long. It certainly recognized the situation and abandoned the tactics which had not been able to achieve results, awaiting a more auspicious moment. That moment might have been long delayed and it is possible that it might never have arrived in the ordinary course of things—though it is hard to believe this in view of an insistent public demand for law reform and for the well defined trend of such reforms, but it was fortunately unnecessary to await the slow course of further pursuasion. By a rare streak of good luck, the Attorney General of the United States took up the proposal when its fortunes seemed at their lowest and with his powerful backing Congress passed the needed legislation.

A Small Part of the Roll of Honor

The list of outstanding men who did their part in the long struggle to achieve the success that has so recently come is too lengthy to be given here. We have already mentioned Thomas W. Shelton. William Howard Taft was preëminent for his energy and devotion to the cause. It is interesting at this time to note that it had no more vigorous advocate than Senator Sutherland, who achieved the seemingly impossible result of actually getting the report from the Senate Judiciary Committee. Hon. Frank B. Kellogg, who recently passed away, also stands out as one of the great protagonists of the measure and had charge of it for awhile in the Senate. The list includes Presidents of the American Bar Association, outstanding lawyers in all sections, and many who enjoyed national fame in the political field. Elihu Root and Judge Alton B. Parker advocated it before the Judiciary Committee of the House in 1914 and secured a unanimous report of that committee in its favor. Hon. John M. Dickinson, of Tennessee, was a member of the first committee. The then Attorney General McReynolds was unwavering in his approval of the measure. Hon. Peter W. Meldrim served on the committee in 1915; and another former President of the Bar Association, Hon. Frederick W. Lehmann, took his place on it in 1921. In 1922 Roscoe Pound became a member of the Committee and in the following year Samuel Williston's name appears as a member. These are only a few of those who championed the great reform. No doubt the reader will be able to supply from his own recollection the names of many other outstanding members of the Association who did their part.

UNIVERSITY LEGAL EDUCATION AND THE AMERICAN BAR

Close Relation of Our Law Schools to the Bench and Bar—Five Phases of Their Inseparable History—The Lost Great Tradition of the Unity of Law and Government Which Characterized First Phase—Today When Growth of Administrative Tribunals Is Recognized as the Outstanding Legal Phenomenon of the Twentieth Century, One of the Greatest Needs of the Country Is a Leadership Trained in Government and in Law—Duty of the Law Schools to Meet This Need—The Litchfield Law School—Langdell and His System—Comparative Method of Study of Law—The National Scene Today and Need for Broader and Deeper Training in the Humanities and Arts of Civilization, etc.*

By Hon. Arthur T. Vanderbilt
President of the American Bar Association

OUR university law schools have never stood apart from the life of the bench and bar in academic isolation. It is impossible for us to conceive of an American Oxford like the Oxford of Matthew Arnold, whispering from her towers the last enchantments of the Middle Ages. What we may lack in charm we have made up in utility. The close relation of our law schools to the bench and bar is exemplified in the Supreme Court of the United States itself. Consider the services of James Wilson at Pennsylvania and of Joseph Story at Harvard in the early days of the Court, and in more recent times of Chief Justice Taft at Cincinnati and Yale, and Chief Justice Hughes at Cornell, of Justice Holmes at Harvard, of Justice Stone at Columbia and of Justice Roberts at Pennsylvania. The history of our state courts would afford many other illustrious examples, notably Chancellor Kent at Columbia and Judge Cooley at Michigan. The number of leaders of the bar who have contributed to the work of our law schools is legion. Whatever the aim of their students may have been, the purpose of these men in their work as teachers, often a labor of love, has been service to the profession and the public.

The history of our American law schools and of the American bar, for the two are inseparable, has at least five phases that seem to me to have significance for us today in evaluating the services of our university law schools to the American Bar.

I

First of all, let me advert to the founding of the first law professorship in America. The circumstances are not without their meaning for us today. In 1779, the American colonies were in the midst of their struggle for independence. The surrender of Cornwallis at Yorktown was still two years off. Valley Forge was a recent and bitter memory. In this hour of despair Thomas Jefferson, then Governor of Virginia, gave cogent proof of his convictions as well as of the soundness of Edmund Burke's observations as to the American people. Burke, it will be recalled, had maintained that in the character of the American people a love of freedom was the predominating feature which marked and distinguished the whole. He had pointed out that in no country in the world was the study of law so general, referring to the fact that nearly as many copies of Blackstone's Commentaries had been sold in America as in England. The profession itself, he said, was numerous and powerful and in most of the provinces it took the lead. To perpetuate this freedom, the liberty-loving Jefferson, whose self-written epitaph, you will remember, was "Author of the Declaration of American Independence, of the Statute of Virginia for Religious Freedom, and Father of the University of Virginia," effected the establishment at William and Mary College of a Professorship of Law and Police and had appointed thereto his old friend and preceptor, Chancellor Wythe. Patriot, signer of the Declaration of Independence, learned alike in the sources of English law and in ancient and Elizabethan literature, and given to quoting all of them in his opinions, George Wythe was a character of singular purity and simplicity. John Randolph of Roanoke, never given to superfluous praise, characterized him as the incarnation of justice. American teachers of law may well be proud to trace their professorial lineage to George Wythe. And they may be perhaps even a little envious of his students, among whom was numbered none other than John Marshall.

It is unfortunate that the word "police" has all but lost its abstract meaning of the control and regulation of a state through the exercise of the constitutional powers of government. The leaders of the Revolutionary period, one and all, recognized that liberty and freedom could not be separated from law and government. They recognized as a first principle that law and government were essential to the very existence of liberty and freedom, and they had no doubt that the study of government was an essential part of the study of law.

This conception of the subject matter of the study of law did not originate with them. It dates back to the earliest university law schools known to history. At Ravenna in the eleventh century, at Bologna in the twelfth century under the great Irnerius, and at Padua, students by the thousands from all over Eu-

*Delivered at New Orleans at the installation of Rufus Carrollton Harris as President of Tulane University of Louisiana, January 17, 1938, and published concurrently in the February number of the Tulane Law Review and the American Bar Association Journal.

rope, from as far away as England, and even Scotland, were studying Roman law, a system of jurisprudence which was not then recognized anywhere in Europe. But they were not studying an obsolete system of law for its own sake. They were pursuing it as a course in Political Science, with the very practical object in view of becoming counsellors, in competition with the older order of ecclesiastical advisers, not only to kings and princes but also to the medieval cities and towns which were in the process of winning their freedom.

It is nothing less than a national misfortune that this great tradition of the unity of law and government has not persisted. In my day at Columbia, twenty-five years or more ago, the brilliant courses in public law of John W. Burgess, the greatest political scientist of the nineteenth century, of Frank J. Goodnow, the first expositor of Administrative Law in any common-law country, and of John Bassett Moore, the foremost authority among us on International Law, were attended by a mere handful of students. The law school students at the turn of the century either felt exceedingly sure of democracy, in which event we must regret their lack of perspicacity, or they had their attention focused exclusively on the bar examinations and on their own self-advancement—an attitude which is responsible, more than any other one cause, for whatever criticism is now levelled at the bar.

Even today, when it is universally recognized that the growth of administrative tribunals is the outstanding legal phenomenon of the twentieth century, Administrative Law is taught in only 56 of the 84 institutions belonging to the Association of American Law Schools. Moreover, where such courses are given, they are generally optional or post-graduate and reach only a very small percentage of the total number of law students. And yet there can be no doubt that one of the greatest needs of the country today is leadership trained in government and in law. It will not do for us to say that there is no time for these matters in the law school curriculum or that Political Science is taught in the colleges. Anyone who has been forced to read of what is termed Political Science may well be forgiven for inquiring as to whether much of it is either politics or science. The plain fact is that Public Law is a phase of the study of government. Government cannot be adequately taught without Public Law, and Public Law in turn can only be taught adequately in law schools. The growth of administrative tribunals, ushering in an era of executive justice, has driven us to the point where Public Law and Government must be considered in the law schools if we are merely to equip our students to represent private clients.

But I submit that we cannot afford to rest our study of Public Law and Government on any such utilitarian basis. If the university law schools of this country are to live up to their pretensions of training men for the public profession of the law they must devote themselves wholeheartedly to the study of the fundamental problems of government. With a large part of four continents of the world governed by force, it remains for us to demonstrate that it is still possible to govern by reason. The issue is age-old. Over 2500 years ago Heraclitus of Esphesus is said to have stated it thus:

"The major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license."

The problem has never been better phrased. Its solution in this era of transition is a challenge to the best brains of our law schools. Not only must we study, for the problem is intricate and technical, but we must also teach, lest we change our form of government in what the late Newton D. Baker once termed a fit of absentmindedness. Today, as never before, we need a Chancellor Wythe occupying a chair of Law and Police in every law school of America.

II

The second phase of the history of American Law Schools that arrests our attention centers around the Litchfield Law School, founded by Judge Tapping Reeve in 1784, five years after Chancellor Wythe began his work at William and Mary and two years after the close of the Revolutionary War. Before the Revolution, the Inns of Court, and particularly the Middle Temple, had been the training ground of many of our best lawyers, including five signers of the Declaration of Independence and six members of the Constitutional Convention. To some degree, the Litchfield Law School supplied the need created by the separation from the Mother Country. Judge Reeve and his associate, Judge Gould, aspired to teach law as a science, and the school had many distinguished graduates in the 49 years of its existence, but the instruction was by lectures which were taken down by the students at length, and the emphasis was primarily on the acquisition of legal knowledge.

It would obviously have been impossible in the little town of Litchfield with less than 1500 inhabitants to have maintained the traditions of the Inns of Court. The Inns of Court depended upon the concentration of the bar in the metropolitan area, but in this country, of course, the lawyers were necessarily scattered throughout the thirteen states. Moreover, a young country which prided itself on its equalitarian doctrines did not afford a congenial soil for all of the traditions of the Inns of Court. Patriots of the Jacksonian era might heartily approve Chief Justice Fortescue's observation that neither a sergeant at law nor a common-law judge ever took off his coif "even in the King's presence, aye, if he be talking with His Majesty," but they insisted, nevertheless, that their judges should go hat in hand on the hustings at frequent intervals if they desired to retain their offices. The tradition of a learned profession entitled to stand covered before any ruler, Demos included, had no chance to prevail in the society that believed that all men are in all respects equal and that was therefore suspicious of any superiority, natural or acquired. Apprenticeship in a law office became the customary avenue to admission to the bar, with admirable results if the student were fortunate enough to attach himself to a real legal scholar, but all too often the apprenticeship amounted to little more than a training for the trade of scrivener or pettifogger.

The task of inculcating our law students with the ideals of the profession—a profession entitled to stand covered in the presence of any ruler—is clearly a part of the function of a university law school. I am not referring to any mere instruction in the Canons of Legal Ethics. I have in mind a study of the history of the profession as a living institution, an intimate knowledge of the lives and aspirations of the great worthies of the bench and bar, an acquaintance with the varied work of our bar associations, and, finally, an intimate individual relation of each law student with some one of the outstanding lawyers of the community who will act as his guide, philosopher and friend. It is to these personal relations more than any other one thing that we may attribute the homogeneous character of the English bar and of the bar of Canada. Gradually our law schools are coming to recognize the importance

of these activities, the results of which we cannot even attempt to forecast.

III

In 1870, Charles W. Eliot, great educational innovator of the nineteenth century, appointed to the deanship of the then moribund Harvard Law School, Christopher Columbus Langdell, legal recluse of the New York bar, and thereby introduced the methods of modern science into university legal education. Langdell believed that law was a science, that the number of legal principles were relatively few, and that these principles were to be derived by law students from the decisions of the courts themselves, and not from the dicta of text writers.

Emphasis was placed on the acquisition by the students of the art of legal reasoning. Legal knowledge, while important, became secondary. There was no uniform system of teaching; the one fixed principle was the use of original sources—the decisions. Some teachers were great expositors; others excelled in the Socratic method. Students began to take a new interest in their work as they came to grips with the realities of the law instead of some professor's reflection of it in lecture or text book. As a result, generation after generation have gone forth from our law schools better equipped in the difficult art of legal reasoning than the law students of an earlier day.

Under this scientific method, moreover, the law became not a mere technical study but a genuine training in the humanities in the proper sense of the term. In stating that "the proper study of mankind is man" Pope was but paraphrasing the dictum of Terence, "I am a man and nothing human is alien to me." What study in the college curriculum could possibly vie with the law as a vehicle for the study of man? No wonder, therefore, that many a superficial collegian coming to law school has felt that for the first time he was beginning to acquire the rudiments of a liberal education.

Scientific method, however, in spite of its great contributions to legal education has not been without its drawbacks. Natural science has developed at an unparalleled pace. Before a book on science can be published it is often outmoded. Under such circumstances, a tentative attitude toward all scientific knowledge is but natural. The effect of this attitude on the social sciences and on the law in particular has been peculiarly unsettling. Law is designed to prescribe rules of human conduct. Under the orthodox theory of the common law its principles were supposed to be universal, eternal and immutable. How can one be expected to obey a rule of conduct when the principle on which it is based is but tentatively accepted? May not advancing science any day destroy the principle? Is it not natural, therefore, for people to query, why obey such a rule? We do not have the same attitude toward an advance in natural science simply because we do not regard our knowledge of the underlying principles of natural science as universal, eternal and immutable. As Alfred North Whitehead puts it, "We do not go about saying that there is another defeat for science, because its old ideas have been abandoned. We know that another step of scientific insight has been gained." Manifestly, we must apply to the study of law the objective standards of natural science.

Law, under the scientific method, has another burden as compared with the natural sciences. It has to deal with legislation. Legislation is designed to express the will of the state through the chosen representatives of the people. It lacks the logical form of the decisions of our courts. It is often emotional in its content, reflecting the passing state of popular opinion. It frequently clashes, particularly in periods of transition, with the preconceived notions of the bar. The result has been an unfortunate tendency of law teachers as well as of judges and lawyers to minimize the importance of the statutory law until such time as it shall have been judicially construed. This is peculiarly unfortunate in a period when statute law is making great inroads on the field of the common law. Clearly, one of the present needs of legal education is a technique for the study of legislation which will do for the study of our statute law what the case system has done for our judge-made law. All too much of our legislation has been haphazard in scope and inept in form. There is great need not only for expert draftsmanship of statutory law but also for an intelligent comprehension of our social and economic problems which must necessarily precede any efforts at draftsmanship. Many statutes today give to administrative bodies the right to promulgate subordinate legislation usually termed regulations. The quantity of such regulations cannot now be estimated; the quality we know is frequently affected by the haste with which they are prepared, the uncertainty as to the aims to be achieved and a lack of skill in expert draftsmanship. Here is a very broad field of activity which should enlist the attention of our law schools.

The case system of law teaching, furthermore, has doubtless been too confining. It has had a tendency to neglect the discipline of the other social sciences. Many reasons may be pleaded in confession and avoidance. Case study of itself is a sufficiently arduous task for even the best students. They are presumed to know the principles of the social sciences—a presumption that is all too frequently readily rebuttable. And then there are the obvious limitations of time and the countless demands on an already overcrowded curriculum. Still the fact remains that the courts do avail themselves of the teaching of the social sciences in deciding cases. Lawyers must be prepared to aid the courts in order to protect their clients. It therefore follows, does it not, that our universities must not teach law as a thing apart, but as one of the social sciences, influenced and buttressed by the disciplines and principles of that advancing sphere of knowledge.

Our law schools generally in the use of the case system, moreover, have given a one-sided education. As I have already observed, they have stressed private law at the expense of public law and government. They have emphasized substantive law to the neglect of procedural law. They have dwelt on judicial decisions at the expense of statute law. The results of these tendencies over the years have been far-reaching. May there not be a casual connection, for example, between the neglect of criminal law in our law schools and the breakdown in the administration of the criminal law generally? Again, may not the fact that the practical legislators realize the existence of such a breakdown be responsible for the creation of many commissions and administrative tribunals to effectuate the social control that the criminal law has failed to achieve.

May I cite another example of the effect of these tendencies? There can be no doubt that popular criticism of law and lawyers centers around the law's delays and the technicalities of procedure. By and large there has been relatively little criticism of our substantive law. If our law schools over the last fifty years had cultivated the study of the processes of the administration of justice with the same zeal that they

have tilled the field of substantive law, if they had centered their attention on the elimination of archaic technicalities and the development of efficient business-like processes in the work of the courts, is it not reasonable to suppose not only that much of the criticism of the law might have been obviated but also that the swarm of administrative agencies might have been to some degree moderated? The American Bar Association through seven distinguished committees of its Section of Judicial Administration is now making the study of these problems one of the chief activities of the year. These committees need, indeed, are entitled to the aid of our law schools.

But whatever limitations may have existed in the scientific approach to the study of the law or in our use of the case method, it still is undeniable that Langdell's contribution to legal education represents the greatest advance that has yet been made in our methods of teaching law.

IV

The fourth phase of American legal education that is of genuine significance today is the comparative method of the study of the law. There is no better way of testing one's insight into a particular system of law than by comparing it point by point with another system. It cannot be a mere accident that the periods of greatest growth in the common law have often coincided with its periods of contact with other systems. Could Lord Mansfield have introduced the Law Merchant into the common law if he had not been versed in the civil law? Could Justice Story, without similar knowledge, have made the contribution he did to the conflict of laws? Even Chancellor Kent, whose dislike for the dogmas of the political philosophers of the French Revolution was notorious, was a deep student of Continental law, particularly in the field of the Law Merchant, to the great gain of the generations of law students who have had occasion to use his Commentaries. No one can estimate what the common law of England owes to the tradition of Oxford and Cambridge for the teaching of Roman Law for a period of several hundred years. In the United States, Tulane University has been foremost in its devotion to the study of the civil law. In the realm of public law, Burgess and Goodnow have made outstanding contributions by the use of the comparative method. As the progress of science in communication and transportation constantly tends to bring the nations of the world nearer together, there is bound to be a revival of general interest in the comparative study of law, at least for advanced students.

But the place where the comparative method could be applied with outstanding results would be in the field of procedural law and administration. There is no more singular paradox in our law than the freedom with which we borrow from each other in the substantive law, on the one hand, and our refusal to learn from our neighbors in matters of procedural law. In the one sphere we are free traders; in the other we have erected an insurmountable tariff wall of provincial pride or insular indifference.

V

So much for the law itself and the study of law. One cannot look at the national scene today without being convinced that the greatest need of our profession is a broader and deeper training in the humanities and in the arts of civilization. Thomas Jefferson recommended to the law students of his day that they study the Natural Sciences, Ethics, Religion and Natural Law, from dawn until eight, Technical Law from eight to twelve, General Politics or Political Economy from twelve to one, History in the afternoon, and Belles Lettres, Criticism, Rhetoric and Oratory from dusk until bedtime. No law student of today, of course, could be induced to follow Jefferson's program, and yet we must remember that his course of study produced such men as Madison and Monroe. Chancellor Kent, in an autobiographical letter, tells how "from 1788 to 1798 [in other words from his 25th to his 35th year, and of course, long after his admission to the bar], I steadily divided the day into five portions and allotted them to Greek, Latin, Law and Business, French and English." Clearly, such a course cannot be the lot of the rising young lawyer of our day, and yet we must remember that this was the regimen that produced the well trained and generously stocked intellects that adapted the common law and equity of England to the needs of a new nation, with a skill unsurpassed in any period of the history of the common law.

To all of these suggestions the plea will be made that we lack time, but I venture to suggest that lack of time is not a sufficient answer to the dangers that must inevitably result from untrained leadership. We must not only insist on a longer period of preparation by the students planning to enter law school, but we must pay more attention to the quality and the subject matter of their preparation. In doing this we shall merely be returning to the best traditions of the Revolutionary period. Warren, in his History of the American Bar, cites the minutes of the bar of Massachusetts as to two young men who were candidates for admission as students in 1784 who were "well versed in Latin and English classics, yet that a course of study in mathematics, in ethics, logic and metaphysics was necessary previous to their admission as students; voted unanimously that such admission be suspended." In 1778 the minutes recite that another applicant was good in Latin but "he has paid no attention to Greek and has not yet been sufficiently interested in logic, metaphysics and mathematics. He has read some approved writers in history and has attended considerably to the French language."

Latin, Greek, French, English classics, mathematics, logic, ethics, metaphysics—I hesitate to think what would happen to the enrollment in our law schools if these fatal, cabalistic words were whispered to the applicants for admission. And yet, who can doubt that the need for just such training and knowledge is greater today than it was in the simple social order of the Revolutionary era. The problem is one which every university head and every law school executive may well ponder. We must give our thought to the pre-legal curriculum. We must avail ourselves of the opportunities of our long vacation periods. It is during the long vacation that most of the students of Oxford and Cambridge do their reading, and there is no reason why, with all of the demands that there are upon the law schools in preparing men for the profession, we should not have long ago likewise availed ourselves of the wasted quarter of the year. And, finally, and most important of all, we must make our students realize that graduation from college and from law school simply mark the beginning for them, as for Kent and Story, of a life dedicated to study and thought as well as to practice.

Having said all of this, let me confess to the conviction that nowhere in our American educational system is more effective work being done than in our

(*Continued on page* 112)

ADMINISTRATIVE AGENCIES AND THE LAW

In This Period of Constant Expansion of Government Activities the Prime Need Is to Develop Methods of Securing and Supplying Civil Officers Who Will Be as Competent and Disinterested in Performing Complex Civil Tasks as Are Graduates of West Point and Annapolis in Their Special Fields, and to Give Them Assured Careers and Tenures—Better Methods for Reviewing and Correcting Arbitrary Action on Part of Government Officials Also Very Important—Immense Scope of Activities of Federal Agencies Today—Rights of the Citizens under Impact of All This Power, etc.*

By Arthur A. Ballantine
Member of the New York Bar

WHATEVER the turn of events, the activities of the Federal Government are likely to continue to be more extensive and intensive than would have been thought possible ten years ago. The object of the greater intervention of Government in business is to secure a more abundant production and better distribution.

That object cannot be furthered unless methods are worked out for greatly improving the quality of Government service. Shabby Government service simply will not help. Providing better methods for reviewing and correcting arbitrary action on the part of Government officials has come to be very important but is not the main point.

The great point today is to develop methods of securing and supplying civil officers who will be as competent and disinterested in performing complex civil tasks as are the graduates of West Point and Annapolis in their specialized fields, and giving to them assured careers and tenures. Service of that character, now neglected, would go far to establish that cooperation between business and Government to which we are looking for recovery and progress.

Most people do not realize what Federal agencies are doing today. Some two weeks ago, after an airplane crash, the Federal Bureau of Air Commerce ordered an air transportation company to ground an entire fleet of planes.[1] Last month the National Bituminous Coal Commission established minimum prices for all bituminous coal produced in the entire country.[2] On certain classes of coal prices were fixed at higher figures than those proposed by the industry itself.[3] At the same time, Governor Earle is attacking monopolistic practices in the much afflicted anthracite industry.

It was recently announced that the Federal Power Commission had denied authority to a private power company to issue bonds and notes to refund maturing indebtedness and that as a consequence the company had had to file a petition for reorganization.[4] The Securities and Exchange Commission may and does deny the right to market and issue securities and may order a broker or firm to cease business.[5]

The National Labor Relations Board recently ordered a great motor company to desist from putting out alleged anti-union statements, presumably made in the honest belief that it was not in the employee's interest to join the union.[6] Last March that Board ordered a large industrial concern to offer to re-hire nearly 4,000 employees who were said to have lost their jobs through a strike alleged to have been caused by unwarranted refusal to deal with the union.[7] The Federal Reserve Board fixes the maximum amount that can be borrowed from banks or brokers on stocks.

Power to make orders controlling business operations may be made much more extensive. The Borah-O'Mahoney Bill, for licensing corporations engaged in interstate and foreign commerce, would confer upon the Federal Trade Commission power to regulate industry by a license system in any way which the Commission might think necessary for the manifold purposes of the bill, including the "enlargement of purchasing power."[8] Revocation of a license would, of course, be a death sentence for the enterprise. It has been well said:

"The license system is the most drastic and bureaucratic of all powers of regulation, and the individuals subject to it have the most need of safeguards."[9]

We have traveled far indeed from the ideas of earlier days. Then the legislative body was supposed to lay down rules of conduct in general terms applicable to all alike: the citizen or his lawyer could interpret the rules, and if he failed or transgressed he could be prosecuted by the law enforcement officers and tried in a strictly disinterested tribunal.

It was that regime of general rules and limited powers that furnished the background for the classical idea of the separation of powers—legislative, executive and judicial. That separation was believed to be essential to liberty. That idea, in utter contrast to the practices of autocratic governments, is by no means

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1. New York Times, January 13, 1938, p. 3.
2. C. C. H. Trade Regulation Service, Volume 1, pp. 11,096-11,097.
3. New York Times, December 1, 1937, p. 17.
4. New York Times, December 31, 1937, p. 19.
5. 48 Stat. 79; 48 Stat. 895 as amended by 49 Stat. 1377-1378: cf. New York Times, December 18, 1937, p. 27.
6. C. C. H. Labor Law Service, Par. 21,633.
7. New York Times, March 15, 1937, p. 1.
8. S. 3072 (75:2).
9. Report of the Special Committee on Administrative Law of the American Bar Association for 1936, found in 61 A. B. A. Rep. 720, at p. 751.

dead. In the Humphrey decision in 1934, the Supreme Court said:

"The fundamental necessity of maintaining each of the three general departments of government entirely free from control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question."[10]

The deeply rooted objection here expressed applies particularly to that touched upon by Montesquieu—often referred to as the "father of the doctrine of the separation of powers"—

"It is the highest masterpiece of legislation to know how to place properly the judicial power. But it could not be in worse hands than in those of the person to whom the executive power had already been committed."[11]

In the Federal Government change from the simple plan admitting the practice of the separation of powers began with the establishment of the Interstate Commerce Commission in 1887. When railroad discrimination and rebates were forbidden by the Interstate Commerce Act, instead of leaving enforcement to the Department of Justice, a special commission was established to make rules to determine upon violations and to bring them to book.[12]

In 1906 the Hepburn Act gave the Interstate Commerce Commission power actually to fix rates.[13] In 1920 the objective was enlarged from the protection of shippers to the promotion of a well organized and effective system of railroads.[14] The jurisdiction of the commission was extended laterally as well to cover oil pipe lines[15] and motor carriers,[16] though jurisdiction over telephone and telegraph companies, conferred in 1910,[17] was in 1934 given to the Federal Communications Commission.[18]

The Interstate Commerce Commission controls the activities of the rail carrier at almost every turn. Not only does it pass upon all rates, on all securities issues, when any can be made, but on most business practices. The present very depressed state of the railroad industry is not on its face any great argument for the success of that control.

The model of the Interstate Commerce Commission was followed in 1914 in setting up the Federal Trade Commission.[19] The Sherman Anti-Trust Act was a statute of the classic type and left it to the Department of Justice to restrain and punish monopolies and combinations in restraint of trade.[20] The Federal Trade Commission Act created a body to give detailed study and regulation to certain trade practices.[21] The powers of that body have already been greatly enlarged, notably in the Robinson-Patman Act of last year, designed to root out unwarranted discrimination between customers.[22]

The Federal Reserve Board, created in 1913,[23] was given power of the greatest importance over banking, and its functions have subsequently been greatly extended. It largely controls interest rates of commercial banks, as well as the amount banks may loan upon securities and what may be collateral, and what securities may form part of the basis for the currency. In addition, the Federal Deposit Insurance Corporation exercises functions vitally affecting the banking system and banking policies.[24]

The tariff Commission, established in 1930, was designed to give flexibility to tariff rates, based upon differences in relative costs of production here and abroad as found by the Commission.[25]

While the development of new Government agencies was progressing, the power of older agencies was, in many cases, greatly increased.

The Treasury, through the Commissioner of Internal Revenue, collects the Federal taxes. In earlier days that task did not involve the exercise of very much official discretion. But when we came to have very high income taxes and estate taxes, resting upon complicated transactions and properties, the rulings of the Treasury became enormously important.

It was with 1933 that the full development of commissions and agencies began. President Roosevelt said in a recent message that they now number over a hundred.[26] They include, besides those mentioned, such great agencies as the Social Security Board, which will deal with payments to upwards of thirty million individuals and with all employers of eight or more; the Maritime Commission, dealing with all shipping; the Labor Relations Board, and many others. The Government agencies also include a very large number of proprietary corporations, operating in different fields, which the Government owns, after the manner of a great holding company. In fact, the President has recently been described as the head of the largest holding company in the world.

The agencies in the Federal Government have not merely multiplied in number but, as we see, they have come to exercise powers that are wholly foreign to the ideas of the founding fathers. They do more than carry out a law, as, for example, make a payment, collect a tax or construct an improvement. They lay down rules actually having the force of law, thus exercising legislative power. Some of them publish extensive compilations of rulings having such force. They also make decisions as to violations, thus exercising judicial power. They may revoke licenses or issue orders analogous to those issued by courts in injunction and other extraordinary proceedings.

When one contemplates this astonishing development of governmental power, there is perhaps a natural revolt against it. No doubt it would make Thomas Jefferson and Andrew Jackson turn over in their graves. We have to recognize that such powers are here, and are here in considerable part, at least, because problems to be dealt with have become more numerous and more complicated than they used to be. Treatment of them often requires more flexibility, and also more detail than was possible under the old law and court system. Perhaps the most that can be hoped for is that the methods of extreme power, with the dangers they carry, will be used sparingly and intelligently.

The question of what becomes of the rights of the citizen under the impact of all this power has been carefully considered and discussed by a very able Special

10. See *Humphrey's Executor v. United States*, 295 U. S. 602, 629 (1934).
11. *Op. cit. supra*, note 9, at p. 722, citing Montesquieu, *The Spirit of the Law*, Book X, chap. 11.
12. 24 Stat. 379.
13. 34 Stat. 584, 589.
14. 41 Stat. 474-499.
15. 34 Stat. 584.
16. 49 Stat. 543.
17. 36 Stat. 539, 545.
18. 48 Stat. 1064.
19. 38 Stat. 717.
20. 26 Stat. 209.
21. 38 Stat. 719.
22. 49 Stat. 1526.
23. 38 Stat. 260.
24. 48 Stat. 168, as amended by 48 Stat. 969 and 49 Stat. 435, 684, 1237.
25. 46 Stat. 696.
26. President Roosevelt's Message to Congress on the Reorganization of Executive Departments of the Government, January 12, 1937, 81 Cong. Rec. 187 (1937).

Committee of the American Bar Association, particularly in two notable reports that deserve attention.[27] That Committee has remarked:

"It is precisely this forbidden commingling of the essentially different powers of government in the same hands that is today the identifying badge of an administrative agency."[28]

The first idea of protection has been to secure effective legal review of actions by Government agencies that may go beyond their powers. As the new practices have developed, there has been little systematic effort to provide for such review. With respect to some types of administrative determinations, there is no statutory provision for a judicial review, and none is available except by extraordinary methods, such as mandamus, injunction or habeas corpus.

In some cases, judicial review has been very carefully provided. A notable case is that of the review of decisions of the Commissioner of Internal Revenue by the Board of Tax Appeals, an independent legislative tribunal from which appeal lies to the Circuit Courts of Appeal. That Board has accomplished an extraordinary service. Other cases are the Customs Court and the Court of Customs and Patent Appeals.[29]

There is a limitation upon the review by the regular, or so-called constitutional courts, established under Article III of the Constitution, and having life tenure, in that the Supreme Court has held that such courts cannot review isues of fact, even in controversies of a judicial character, if such issues were heard and decided in the first instance by an administrative tribunal or agency.[30] These decisions are based upon the theory that such findings of fact are acts of the executive arm of the government, and that the separation of powers doctrine woven into the Constitution forbids the review of acts of the executive, except so far as questions of law are involved.

Limitations imposed by this rule are made less stringent in reality by the fact that questions of fact may be found to be involved in the determination of questions of law. Thus, if an administrative tribunal in making an order appears to have acted arbitrarily in defiance of the evidence, or without the support of evidence, or has exercised its power in a wholly unreasonable manner, then the regular courts may review the facts found by the administrative court.[31] In practice, the rule strictly as stated does not appear to be followed by the courts, and it may be hoped that this tendency will continue.

It is clearly established, however, that a legislative court, set up by Congress for the purpose, may review decisions of administrative agencies both as to the law and facts.[32] Examples of the use of this power are found in the Court of Claims as well as in the Board of Tax Appeals. There would be no question about the exercise of a similar power by an executive tribunal set up within a department.

For better machinery to protect the citizen from abuses by all powerful government agencies, the first proposal was for the establishment of a single great administrative court with trial and appellate divisions, to which would be transferred most of the judicial functions now exercised by administrative officers and bodies. The principle of that proposal was embodied in bills introduced by Senator Logan in the 73rd and 74th Congresses.[33] Under the second of these bills, both the members and jurisdiction of the Court of Claims, the Customs Court, the Court of Customs and Patent Appeals, and the Board of Tax Appeals would have been immediately transferred to the new court. In addition, it was proposed that the new tribunal should have jurisdiction over tax claims, over the revocation and suspension of licenses, and other regulatory acts.

This proposal for a single review tribunal was originally endorsed by the Special Committee of the American Bar Association.[34] The proposal actually died in committee in the 74th Congress,[35] and the Bar Association Committee has now abandoned the principle.[36] One of the important reasons for the change was the opinion, widely held, that the courts or tribunals which would have been merged into the new court are functioning so satisfactorily as they stand that they should not be disturbed.

A different plan, advocated by the Special Committee in its 1937 report, is for diversified review in each of the executive departments.[37] Under this plan, each department or agency would be required to set up as many intra-departmental boards as would be required to handle satisfactorily appeals on both the law and the facts, taken by aggrieved persons from the decisions of administrative officers within the departments.

The members of these boards of review would be appointed from personnel of the departments and, when not engaged in judicial work, would perform other duties. The idea is that this would serve the double purpose of keeping the members in touch with practical affairs and help to keep appointments within the career service. All such boards would be required to make written records, written findings of fact, and give written decisions from which appeal could be taken to the regular courts.

This proposal would leave such independent boards and commissions, as the Board of Tax Appeals, the Customs Court, the Court of Customs and Patent Appeals, the Federal Trade Commission, and the like, as they stand. It does not endeavor to provide an immediate cure for all evils in the present system, but would attempt to assure a quick, uniform, inexpensive and elastic review, with a definite right of appeal. Such a system would have decided advantages in the way of flexibility and would not be so likely to hamper the

27. *Op. cit. supra*, note 9; Report of the Special Committee on Administrative Law for 1937, found in the 1937 Advance Program of the American Bar Association, p. 168. For the earlier reports of the same Committee see 58 A. B. A. Rep. 407 (1933); 59 *id.*, 539 (1934); 60 *id.* 136 (1935). Each of these Reports contains numerous citations of authorities which bear on the various problems raised by the Committee's studies. Special attention should be called to the Reports of the President's Committee on Administrative Management, which was transmitted to the Congress on January 12, 1937, and of the Senate Special Committee to Investigate Executive Agencies of the Government with a view of Coordination, of which Senator Byrd was Chairman; as well as to the Reports of The Brookings Institution to the Byrd Committee. Also of special interest is the Committee on Ministers' Powers Report (1932), Cmd. 4060, in which similar problems which have arisen in England are considered.

28. *Op. cit. supra*, note 9, at p. 727.

29. For a summary of the diverse methods provided for the review of administrative decisions see 58 A. B. A. Rep. 407, 413-414 (1933).

30. See *op. cit. supra*, note 9, at p. 729 and authorities cited.

31. See *I. C. C. v. Union Pacific R. R. Co.*, 222 U. S. 541, 547-548 (1912).

32. See *Federal Radio Commission v. General Electric Company*, 281 U. S. 464, 468-469 (1929).

33. S. 1835 (73:1); S. 3787 and H. R. 12297 (74:2).

34. *Op. cit. supra*, note 9.

35. *Id.*, at p. 759.

36. 1937 Advance Program of the American Bar Association, at p. 184.

37. *Id.*, at pp. 170-173, 199-222, 225.

effective performance of government functions as a rigid external tribunal.

The difficulties of working out, under present conditions, a satisfactory plan for effective and practicable review of administrative actions which have led such a competent committee to change its mind and to recognize that a complete cure cannot be found, emphasize the truth that the real need of this day of greater government activity is for a far higher standard of government service. It is strange indeed that in the period of greatest expansion of government power the development has been along the line of lowering the standard of service rather than of building it up.

Thus we find, according to figures recently released by the Civil Service Commission, a marked increase of non-civil service appointments. In 1932, there were reported in the regular government employ a total of 467,161 or 80-8/10% in the classified service, as compared with a total of 532,073, or but 63-2/10% in 1937. During the same period, the total in the unclassified civil service has grown from 111,070 or 19-2/10% to 309,591, or 36-8/10%.[38]

This development was by no means accidental, as in most of the emergency legislation provision was made for appointments outside of the civil service. In June, 1937, the Civil Service Commission protested to the President against the increasing number of bills introduced in Congress containing provisions for complete exemption from the merit system. While the President has cautioned Congress against legislation disregarding the merit system, and has in general terms repeatedly urged its extension, we find that he signed the Guffey Coal Bill, which exempted the employees from the merit system.[39]

The Special Committee of the American Bar Association on Administrative Law, in its last report, most wisely urges the actual building up of the merit system so that it will cover all non-policy making Federal posts which are not now under civil service.[40] The development would be to make all appointments to non-policy making posts dependent upon qualifications rather than affiliations; to provide compensation and advancement commensurate with the service performed; to prevent arbitrary removal or decrease in pay, and to make promotions dependent upon merit rather than on contacts.

Whatever officials are to be appointed to fill reviewing posts, Congress should provide for a tenure of office sufficiently long to reduce to a minimum the pressure which can be exercised by virtue of the power of re-appointment, and should also place careful restrictions on the Executive's power of removal of such officers. Under the decision of the Supreme Court in the Humphrey case there would seem to be no bar to this.

The administrative bill for the reorganization of executive departments now before Congress seems to be likely to result in tearing down the service rather than building it up along the lines obviously necessary.[41]

Why abolish the independent Civil Service Commission as proposed under that bill and vest all powers over personnel in a single officer bound to work in close harmony with the Executive?

And why take the great legislative commissions, like the Interstate Commerce Commission and the Federal Trade Commission, and put them under greater domination of the Executive? Those commissions are by no means mere executive bodies: they necessarily represent the legislative power as well. Thy should be kept responsible to Congress as well as to the Executive. And certainly Congress should keep its hold over the spending power by maintaining a pre-expenditure audit under the Comptroller General, or an equivalent officer.

How is the Government to secure an adequate supply of trained officials of proper character and standards? To insure properly trained military and naval officers the Government maintains West Point and Annapolis. Circumstances with reference to the civil service are undoubtedly different, and while it has been proposed that the Government should itself establish a corresponding school for civil administration,[42] it might be wiser to take steps to secure young civil officers from existing educational institution, along the line so successfully followed in England. Some plan for securing greater competence and character in the service can be developed if there is a will to do so.

If the Government service comes to be made up in large part of highly competent, disinterested and permanent personnel, not only will there be better and fairer decisions in particular cases, but we may achieve the shaping of Government policies on firm ground rather than on grounds of prejudice and political expediency. If the Executive has and uses a proper general staff we may not have unwise campaigns in the field of business any more than in the military field.

How far the powers of Government must continue to be brought to bear in our daily affairs may be a question. Perhaps the use can be more sparing than we now think, but in any case the only sound and protective course is to refine and improve the instrument.

38. *Id.*, at p. 177; 54th Annual Report of the U. S. Civil Service Commission (1937), p. 83.
39. 50 Stat. 72.
40. *Op. cit. supra*, note 36, at pp. 168, 177-180.
41. S. 2970 (75:1).
42. H. R. 5359 (74:1); H. R. 11,225 (74:2); H. R. 3141 (75:1).

UNIVERSITY LEGAL EDUCATION AND THE AMERICAN BAR

(*Continued from page* 108)

professional schools and that nowhere in our professional schools will you find a higher devotion to truth, a greater zeal for learning and service than in our university law schools. If I have dwelt on what appears to me to be short-comings, it is not with a desire to criticize, but rather to point the way to greater usefulness. Through cooperation over a score of years, our university law schools and the American Bar Association have revolutionized the standards of legal education and of admission to the bar though much still remains to be done. The needs of the time, I submit, demand a further advance in the interest of the public. Lawyers are thinking as never before of the problems of the profession, and of the problems that confront a troubled people. I know from my visits to the bar associations of many states that you will find the lawyers of the country ready, willing and anxious to work with you for a further advance of the process of reason, of law, of liberty, of democracy and of education against the element of force, of tyranny, of hate and of oppression that is now threatening the entire world. The challenge is clear, and knowing both law schools and lawyers as I do, I face the clouded future with confidence and with no doubt in my mind as to the outcome of the encounter in this country.

BOARD OF GOVERNORS HOLD MID-WINTER MEETING AT SAVANNAH

By Joseph D. Stecher
Assistant Secretary of the American Bar Association

THE Board of Governors, meeting at Savannah, Georgia, January 24th to 26th, successfully completed disposition of the heaviest agenda in years. The expansion of the normally heavy program for its midwinter meeting was due to the fact that for the first time it had before it a tentative report from each Section and Committee of the Association outlining the work contemplated during the year. Particular attention to each report was made possible by the assignment, prior to the meeting, of a member of the Board to review each report and submit his comments.

Outstanding among a multitude of matters acted upon was authorization to print a complete index of the American Bar Association Journal from Volume 1 down to date. The Editor-in-Chief reported that such index has been in process of preparation for the past year and that it is much in demand among lawyers and law teachers everywhere. The index is to be included in the 1937 annual report of the Association which will soon be off of the press.

Proposals as to Public Relations Approved

The Board's sub-committee on Public Relations made a report which was approved. In it attention was directed to the activities of many state and local Bar Associations in this field, and it was recommended that the chairman of the Section on Bar Organization Activities and its committee on Public Relations be requested to establish and maintain contacts with the various state and local committees on the subject and to report thereon at the Annual Meeting in Cleveland.

In accordance with the sub-committee's further recommendations, approval was given to a radio program dealing with the courts, the lawyers and the activities of the American Bar Association, if such a program can be worked out feasibly; also to the proposal that facilities be provided to furnish the press with accurate information on the Association's activities. The report expressed the conviction that newspaper editors are keenly interested in the work being done currently in promoting American Citizenship, in legal aid for the indigent, in legal clinics, and in the broad program for improving the administration of justice, and that they will be eager to render assistance in matters of such concern to every citizen.

To Ask President to Proclaim "National Citizenship" Day

Having direct bearing on the foregoing, were the reports of the committee on American Citizenship and the Junior Bar Conference, who are working together upon a broad program of public education on Governmental problems. (A.B.A. Journal Dec. 1937 page 920). Approval was given to the request that the committee be authorized to invite the President of the United States to issue a proclamation designating June 21, 1938 as "National Citizenship Day." This day marks the 150th anniversary of the date when the State of New Hampshire ratified the Constitution, thereby providing the required majority of States necessary for its adoption. A nation-wide radio program is contemplated for Citizenship Day and it is expected that local broadcasts in furtherance of the Committee's program will be made in various localities during the year.

To Investigate Feasibility of Daily Newspaper at Annual Meeting

Also pertinent to relations with the press was the adoption of a suggestion that a sub-committee be appointed to investigate the feasibility of publishing a daily newspaper at the annual meeting to report all meetings of the preceding day. It was considered that such a publication would not only be very useful to those members in attendance but that also it would greatly assist representatives of the press in the difficult task of accurately reporting the multitude of daily meetings. This sub-committee is directed to report at the next meeting of the Board.

Approval was given to the four-point program of the Interstate Commission on Crime of the Council of State Governments submitted by the Section of Criminal Law to the House of Delegates at the Kansas City meeting and by it referred to the Board. Such approval was expressed in the following resolution:

"Resolved: That the American Bar Association hereby goes on record in favor of, and urges the various state and local Bar Associations to give their active support to, the enactment in every State of the Union of the four-point Legislative Program of the Interstate Commission on Crime of the Council of State Governments, consisting of: First, the act for the fresh pursuit of criminals across State lines; Second, the revised act for uniform extradition; Third, the revised uniform act for the removal of out-of-state witnesses; Fourth, the act for the supervision of out-of-State parolees and probationers; and, finally, the execution of the Interstate compact under such last named act, to the end that our sovereign States may actively cooperate to control crime and protect the citizens."

Patent Section's Proposals Approved

Another matter referred to the Board by the House of Delegates involved two proposals of the Section on Patent, Trademark and Copyright Law. Approval was given to the Section's recommendation that a Government Committee be created to revise, consolidate and extend the Federal trademark statutes to the end that greater security will be given to trademarks, deceptions in the sale of goods prevented and our treaty obligations carried out. Approval was likewise given to the Section's other recommendation proposing an amendment to the T. V. A. Act, which amendment provides in substance that a patentee shall have the same remedy against the T. V. A. with respect to an infringement committed in connection with the commercial competition by T. V. A. with any private enterprise, that the patentee would have against any private individual for a similar infringement. It was stated that the present act places the T. V. A. in a much more

favorable position than a private enterprise in case of a patent infringement.

At the request of the Standing Committee on Federal taxation, it was authorized to hold a public meeting similar to that held last March in Washington, at which all members of the Association will be given an opportunity to make suggestions as to improvements in tax legislation and in tax administration. Permission was also granted the Committee to conduct a Tax Clinic at the next annual meeting following the plan which proved successful at the Kansas City meeting.

Law Institute at Annual Meeting Conditionally Approved

Another suggestion involving practical benefit to those attending the annual meeting came from the Section on Legal Education and Admissions to the Bar. It proposed that a Law Institute be conducted at which several lectures would be delivered by a prominent legal scholar on a subject of practical concern to practicing lawyers. The suggestion was approved providing it can be worked out in the program and providing it will involve no expense to the members of theAssociation.

A communication from the special committee on Securities Law and Regulations requested instructions from the Board as to the committee's jurisdiction and duties. By appropriate action, the Board directed the committee to consider State as well as Federal laws and regulations; to study laws and regulations dealing with security markets and exchanges and to continue its investigation of the Barkley Bill and Lea Bill now pending in Congress. The Committee continues to be under the supervision of the Board.

Creation of a sub-committee within the Board was also authorized to consider the Barkley Bill, the Lea Bill, the Chandler Bill and kindred legislation. These Bills involve matters of importance not only in the field of securities regulation but also in the fields of Municipal Law, Public Utility Law and Commercial Law and Bankruptcy. In the discussion of the subject, alarm was expressed over the growing tendency toward vesting judicial power in boards and commissions to the extent that courts are sometimes powerless to act even in matters wherein they have heretofore exercised original jurisdiction. It was considered that careful and constant attention should be given to developments in this field.

Creation of Section of Commercial Law Considered

Report was made to the Board of growing interest in the creation of a new Section on Commercial Law. It was pointed out that the Committee on Commercial Law and Bankruptcy has been so occupied with rapid developments in the bankruptcy field that little attention has been given to the other field embraced by its title. A sub-committee was therefore created to survey the field of Commercial Law and Commercial Lawyers and report at the next meeting.

Attention was given to law student activities, such as student Bar Associations, and to the possibility of assisting them in becoming acquainted with organized Bar work. The Board recommended to the Junior Bar Conference and the Section on Bar Organization Activities that they study the question and make recommendations thereon. A suggestion that law students be furnished the AMERICAN BAR ASSOCIATION JOURNAL at cost was also adopted.

Sub-Committees were appointed to study and report on the publication of a document or documents with respect to the new Federal Court Rules and to develop further plans for making the Association and its publications useful and of practical assistance to members in their professional work.

Consider Report of Conference of Section Chairmen

In addition to the consideration of individual Section and Committee reports, the Board considered at length the report of the conference of Section Chairmen held at Chicago last December 10th and 11th and the suggestions emanating therefrom. (A. B. A. Journal January, 1938, page 22). Authority was given the President to appoint a special committee to study the feasibility of an undertaking, by the Association through its own staff, or in cooperation with other agencies, to make available to its members material dealing with various topics of the law bearing on the work of the Sections and Committees of the Association.

Requests were presented from several of the Sections for approval of amendments to their by-laws. The discussion revealed a lack of uniformity in the by-laws of the several Sections and a sub-committee of the Board was appointed to make a survey of all Section by-laws and submit its recommendations. This extensive undertaking is designed to bring about further coordination within the Association itself. Among the matters involved in the survey are the questions of Section dues and the limiting of the terms of officers and members of Councils. In the discussion, disapproval of $1.00 per year dues was indicated, inasmuch as all present dues-paying sections are exacting $2.00 per year. The Board concurred in the general opinion expressed at the conference of Section Chairmen with respect to limiting terms of office. This question is referred to the House of Delegates with the recommendation that Section Chairmen and Vice-Chairmen serve not more than two terms (with a preference indicated for one term) and that secretaries serve not more than four terms of one year each.

Section Reports in the House of Delegates

Another matter to which the Conference of Section Chairmen devoted considerable discussion concerned the presentation and approval of the various Section reports in the House of Delegates. It was pointed out that the Constitution requires approval by the House of Delegates of the report of any Section or Committee before it can be considered the action of the Association. Experience thus far has revealed considerable difficulty in obtaining adequate presentation of these reports before the House. In a number of instances that body has declined to act upon a report because of the absence of opportunity for full consideration of it. The Board, therefore, is recommending to the House of Delegates that it amend its Rules so as to provide for the appointment by the Chairman of a Committee of seven members, two of whom shall be members of the Board of Governors and one of whom shall be a member of the Committee on Rules and Calendar, to be known as the Committee on Section Recommendations.

Under the proposal, the Committee is charged with the duty of considering the reports of Sections, together with the recommendations contained therein, to provide opportunity for hearing before it of Section Chairmen or their representatives concerning such reports and recommendations, and to report to the House of Delegates concerning them with the recommendation of such committee with respect thereto. It is also recommended that the program of the House of Dele-

gates be so arranged that the reports of committees of the Association be received and acted upon during the early sessions and that Section reports be deferred until further opportunity has been given for the proposed committee to adequately function.

Further to facilitate action upon any section report involving proposed legislation, the Board adopted a recommendation directing each Section to confer with the Conference of Commissioners on Uniform State Laws whenever it contemplates the preparation of any Bill sought to be enacted into law. Such procedure is contemplated by the by-laws of the Association. The Board also approved the creation of a standing sub-committee of three of its members to consider and report on all bills referred to it by the Conference of Commissioners on Uniform State Laws.

Other matters relating generally to the Sections are left with a sub-committee of the Board for report at the next meeting.

State Delegates to Meet in Washington, D. C., May 11

The time and place of the meeting of the State Delegates for the purpose of nominating the officers of the Association was set for May 11th, 1938 in Washington, D. C. An opportunity will thus be afforded the Delegates to attend the sessions of the American Law Institute.

With respect to the election of and terms of State Delegates, the Board expressed its opinion on the question raised by several delegates as to the effect of the amendment of the Constitution adopted at Kansas City. Some thought it meant that the State Delegates, formerly members of the General Council, whose terms expired at the conclusion of the 1938 meeting, went out at the beginning of the 1938 meeting and that the new men, those to be elected in 1938, would go in at the beginning of the session. But this would deprive men of an office to which they had been duly elected, would conflict with the many times expressed intent to preserve the office of all men, in the new set-up, for the same period to which they had been elected. It therefore became necessary, in order to prevent serious misunderstandings, to construe the amendment.

The basis of the decision was that the amendment itself began with the words, "After 1938," and although those words were not repeated at the beginning of each following sentence, the majority of the Board of Governors was of the opinion that those words applied to everything in the amendment, that none of the changes therein provided for took place until after 1938, and therefore that the terms of State Delegates, formerly members of the General Council, continued until the end of the 1938 meeting, and that those who should be elected in 1938 would take their seats at the end of that meeting.

Mention is not made of the many administrative problems connected with the budget and membership work which required a substantial portion of the time available at the three day session. Necessarily this review of the midwinter meeting is only a brief summary of what was done.

Southern Hospitality at Its Best

Southern hospitality was at its best in the entertainment provided for those in attendance at the meeting. There was a reception to the members of the Board of Governors and their wives by Mrs. Peter W. Meldrim, widow of the thirty-seventh President of the Association, assisted by many of the ladies of the Savannah entertainment committee. The program of entertainment for the ladies included visits to numerous points of historic interest and the visitors were greatly impressed with the beauty of Savannah and the charming hospitality of their hostesses.

AMERICAN BAR ASSOCIATION

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THE SECRETARY,

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(*Above are members Ex-Officio.*)

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Sixth Circuit, ———

Seventh Circuit, FRANK T. BOESEL, 152 West Wisconsin Ave., Milwaukee, Wis.

Eighth Circuit, JACOB M. LASHLY, 705 Olive St., St. Louis, Mo.

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Tenth Circuit, ROBERT STONE, 1000 Kansas Ave., Topeka, Kan.

INSTITUTES AND COURSES FOR PRACTICING LAWYERS

BY WILL SHAFROTH

Advisor to Department of Legal Education and Admissions to Bar

LEGAL institutes, consisting of short series of lectures by authorities in particular fields of law, continue to spread and will soon reach the point of becoming one of the recognized major activities of the large city bar associations. Kansas City, Dallas, Chicago and Baltimore have the question of setting up an institute before them at the present time, while committees in Pittsburgh, Boston, Philadelphia and other cities are investigating the field for this activity and trying to ascertain the desires of their members as to advanced legal education.

Meanwhile an increasing number of associations are arranging for some type of lectures or courses from which their members will benefit in a practical way. The Illinois State Bar Association has taken the initiative in that state and has announced to local bar associations that it has speakers available on the newer developments in practice to deal with such subjects as labor legislation, administrative law, corporate reorganization, registration of securities, the Robinson-Patman Act and taxation. The speakers are from Illinois law schools, are specialists in the subjects they discuss and make no charge for their services other than their expenses. The object which Illinois has in view is "to overcome the hesitancy of the average lawyer to enter into some of these more technical fields and at the same time to equip him to advise his clients more effectively on these problems," a purpose very much in line with the Illinois Bar Association's continuous search for activities of practical benefit to its members. As an illustration of the scope and nature of the discussions, the January number of the Illinois Bar Journal lists a number of speakers from the University of Illinois Law School who are available and their subjects.

The Los Angeles Bar Association is going farther and proposes to set up two types of courses, "one that will enable the older active practitioners to check up on the changes, progress and developments in various branches of the law—an intensive re-examination of specific subjects; the other for the younger lawyers, of a practical nature." The advanced course includes the subjects of Constitutional Law, Corporate Procedure Under State and Federal Acts Relating to Issuance and Public Offering of Securities, Federal Procedure, Bankruptcy and Reorganizations Under 77B, Death and Succession Taxes, Trade Practices, Law and Labor Relations, Wills and Trusts, and Recent Federal Legislation. The course for younger lawyers is called a "practical course" and deals with such matters as trial procedure, appeals, drawing of contracts, organization of corporations, taxation, bankruptcy, administration of estates, etc. Whether this program will be adopted depends on the response to a letter sent out in December by President Loyd Wright, but judging by the enthusiasm which the bar generally is showing for any type of advanced legal education which is offered, there should be no doubt that the Los Angeles program will be scheduled.

Another recent instance of activity is the course on Administrative Law which is being offered by the University of Minnesota Law School for the benefit of the bar, and as a result of consultation between state and local bar association committees and the law school authorities. This course will be given by Professor Edward J. Jennings for two class hours one evening a week for sixteen weeks, the tuition fee for the course being ten dollars.

A statement in reference to the origin of the course says: "The march of time obviously requires every alert lawyer to become acquainted with new developments in the field of law. The marked success of the Hennepin County Bar Association has been due largely to the fact that its noon luncheons are predominantly devoted to questions of practical importance to the profession. However, certain subjects require study by the practitioner under the guidance of an expert so that lectures and discussions may be fruitful, continuous and coherent. For this reason your committee asked Professor Jennings to offer this subject and he has kindly consented."

Mention has previously been made (in the January JOURNAL) of the Seligson courses in New York, the Stanford Law Society courses in San Francisco, now in their second years, the series which has been inaugurated this year in Philadelphia by the Temple Law School alumni, and the course in Toledo which has been arranged by the University of Toledo Law School.

Another type of course which was referred to at the meeting of the Section of Legal Education in Kansas City is that given by the John Marshall Law School of Chicago. This falls into three general classifications.

One classification consists of a course particularly designed for the more experienced practitioner under the title "Current Law Lectures" and deals with such topics as the Social Security Act, the Robinson-Patman Act, Corporate Reorganization, Air Law, Taxation, etc. A second group is given particularly for younger lawyers, for whom some thirty sessions are devoted to trial technique. The third division of subjects is made up of courses of differing lengths in such fields as Chancery Practice, Brief Writing and Appeals, Probate Practice, Corporation Practice, Federal Practice, Bankruptcy, etc. Many practitioners of considerable experience have taken these courses.

The Seligson Practicing Law Courses in New York, which seem to have been the chief inspiration for most of the courses for young lawyers which have sprung up lately, are now in their eleventh series. Two types of courses are offered. The General Course "is intended primarily for the younger lawyer to orient him in the field of general practice and to furnish background and essential information ordinarily acquired only after years of experience." The Specialized Courses "are designed for lawyers who have been in practice for some years and desire a detailed presentation of the specialists' methods of handling matters."

A number of local bar associations are being asked to consider the possibility of the organization of a series of lectures which will give an opportunity for advanced legal education. The Council of the Legal Education Section will be glad to furnish further and more detailed information to any bar officials who are interested.

LINCOLN AND THE COURTS OF THE DISTRICT OF COLUMBIA

Story of How Congress Acted During the Civil War to Get Rid of Obnoxious Jurists on Circuit Court of the District of Columbia Who Were Suspected of Sympathy with the Enemy—Bill Abolishing Court and Creating Entirely New Tribunal Jammed through Both Houses in Closing Days of Thirty-Seventh Congress in Face of Resentment of Entire Bar and Formal Remonstrance of Several Thousand Citizens of District—President Lincoln Signs Bill—Characters of Some of the Judges Involved.

By F. Lauriston Bullard*
Editorial Writer on the Boston Herald

THERE appeared in the *New York Tribune* of March 5, 1863, in a special dispatch from that journal's Washington correspondent, a four-line paragraph to the effect that the bill for the reorganization of the courts of the District of Columbia had passed, and that "the result would be the administration of justice in the District upon anti-slavery, instead of pro-slavery, principles."

That small item, together with a single allusion in the Diary of Gideon Welles, served as the clue for an investigation of the method employed by President Lincoln and the Republican majorities in the two Houses of Congress to make over a court by other processes than those which might ordinarily have been used.

The judges of the Circuit Court of the District of Columbia were believed to sympathize with secession. Charles Sumner was saying in the Senate that it "was notorious that we have about us many disloyal people, that there is here a very disloyal population." Henry Wilson, also a Senator from Massachusetts, and later to become Vice-President, at the climax of the debate over the reorganization bill, named the Chief Judge of the Circuit Court, and declared: "I believe his heart is sweltering with treason."

That this District of Columbia tribunal was then, and always has been, considered a court of outstanding importance, was emphasized by the Supreme Court of the United States in a decision some years after the Civil War in which a careful distinction was drawn between the Federal District and the Territories which as parts of the outlying domain of the country were set up in preparation for statehood. The Court affirmed the District to be "a permanent part of the United States" and "the very heart of the Union." The judges of such a court were bound to be in "closer contact with, and more immediately open to, the influences of the legislative department, and to exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments" than any of the other inferior Federal Courts. (O'Donoghue v. United States, 289 U. S. 516.)

In the midst of the war all such considerations must have seemed of far greater moment than would have been the case in times of peace. A new party had come into power in 1861. Vast changes were taking place in the District. Congress abolished slavery in the District in April, 1862, and in all the Territories of the United States in June of that year, and the Emancipation Proclamation became effective with the advent of the following year. Until the middle of 1863 the war seemed a stalemate. Those in places of high responsibility at the national capital were impressed with the necessity of having all the important posts in the three branches of the government filled with men not only strong and able but "tried and true."

Whether the charges in circulation in official Washington against the judges of the Circuit Court of the District were justified or not, and however mixed may have been the motives of the party in control of the government, the Republican leaders decided to circumvent the slow and uncertain processes of impeachment for getting rid of the obnoxious jurists. Congress abolished the old court altogether and put in its place a new Supreme Court of the District of Columbia, endowed with practically all the powers of the court which it superseded. The bill was jammed through both Houses in the closing days of the 37th Congress, in the face of a formal remonstrance by several thousand citizens of the District, and of the passionate resentment of almost its entire bar—and the President promptly signed the bill and appointed a new group of judges.

It was on December 1, 1800, that the District of Columbia became by law the seat of the Federal Government. In the next year Congress had organized the Federal Courts into districts and circuits, and had erected a Circuit Court for the new Federal District. At that time this District comprised areas on both sides of the Potomac River, and the new court may have been called a Circuit Court because its judges sat alternately in Washington and in Alexandria. Successive Acts of Congress entrusted to this Court a jurisdiction which has been described as "more extensive than that of any other court in the country, it being at once a local and a Federal court, situated at the seat of government." Mr. F. Regis Noel of the District bar and Margaret Brent Downing, in a monograph on the history of the building occupied by the court, stated that the court was "fortified by so much of the common law of England as was applicable to the situation of this

*Mr. Bullard has long been a student of the life of Lincoln and in this article he has uncovered an episode of special interest to lawyers.

country; the bill of rights, constitutions and statutes of the States of Virginia and Maryland, such as the English statutes as existed and were continued in the States, and by such laws as the early Congresses enacted." The Court also had "power of adjudication over all seizures on land and water, and all penalties or forfeitures made, arising, or accruing, under the laws of the United States." The authority of the Court "extended to Cabinet members and other officials of the general government, breaches of the revenue laws of the United States, appeals from the Orphans' Court, and from judgments of justices of the peace."

Extensive enough, surely. That learned jurist, William Cranch, who became Chief Judge of the Court in 1805, stated its functions in terms which clearly indicate why it was deemed of such vital consequence to have the "right" judges on its bench in 1863. "It is the tribunal," said he, "to which is entrusted originally, or by appeal, the execution of those laws which protect the personal liberty and property, not only of citizens of the District, but of all the officers of the government, and of the members of both Houses of Congress; and of all citizens of the United States, visiting this neutral ground, the common domain of all the States."

Yet for three-score years that court functioned without a code. Its jurisdiction was not carefully defined. It was vague, presenting a troublesome problem to both the bench and the bar. The attempt of Judge Cranch to compile a code in 1816-1818 proved a failure. A joint committee of Congress reported a code in 1832 on which no action was taken. Numerous efforts in the ensuing twenty years to codify the laws of the District yielded no tangible results. A commission named by President Pierce submitted a code, as directed by Congress, to popular vote, and the residents of the District rejected it two to one. During the decade preceding the war the court lost much of its prestige owing to these complications and the slowness with which it did its work. Once more, at the behest of Congress, President Lincoln in 1862 appointed a codification committee, but the Senate refused its confirmation.

Meantime, the race issue had become acute. Slavery no longer was a lawful institution in the District. Ordinary civil rights, with the exception of jury duty, were granted the Negro. And Washington was a southern city. Many of its people believed in the cause of the South. They feared that under emancipation the District would become a haven of refuge for "undesirable" freedmen. Also it happened in the early months of the war that colored persons were suspected of being runaway slaves simply because of their color, and often were thrown into jail without just warrant. A northern Senator stated that many colored men arriving in the capital from the free States were arrested as fugitives. Under the tense conditions of the time, while much of the blame for this situation attached to the fee system which provided constables and magistrates with their living, Republican opinion lodged the responsibility with the Circuit Court of the District.

Thus on the one hand the lack of a code for the court could be put forward publicly to promote the drastic action which the party leaders were considering, and at the same time the injustice to which black men, whether residents or transients, were frequently subjected, could be, and was, employed as an argument against the retention of the judges of the court. The opinions of the President and the Cabinet are intimated plainly enough in a sentence in the Diary of the Secretary of the Navy: "Appointments considered. . . The court for the District is more important [than the Supreme Court of the United States!] and unfortunately the hearts and sympathies of the present judges are with the Rebels." One who studies the course of events during these few months is bound to be convinced that Lincoln was consulted and that he endorsed, if he did not originate, what was done.

At that time the Chief Judge of the Circuit Court was James Dunlop, and the Assistant Judges were James S. Morsell and William M. Merrick. There was also a separate court for the trial of criminal cases with Thomas H. Crawford as its Judge. The Chief Judge was far on in years. The criminal judge had been ill for a long time and was unable to hold court for about three months prior to his death near the end of January in 1863. Numerous criminal cases then had to be tried by one of the Circuit Judges in addition to the civil cases. Judge Morsell had been on the bench almost a half-century and was really superannuated. Thus the mass of civil and criminal cases both fell upon two men, the Chief Judge and Judge Merrick. The dockets became crowded. Dissatisfaction appeared even among the friends of the judges. The jurist whom Senator Wilson denounced so bitterly was Judge Merrick, who had been appointed from Maryland in 1854. He had made himself particularly objectionable to Congress because of his attempt to hamper what he considered the excessive zeal of the Provost Guard by issuing a writ of habeas corpus in the case of a certain man the Guard had put under arrest. The military authorities not only refused to honor the writ but stationed sentinels at the door of the judge. His confrères summoned the Guard for contempt, but, on learning that the President had directed that the writ be not honored, they abandoned the contest, and Judge Merrick resumed the duties which he construed himself to have been prevented from performing. When the bill for the abolition of the court came up in the Senate therefore one of the judges had been under surveillance which he considered equivalent to arrest.

The remodeling bill was introduced in the Senate as early as May 23, 1862, but actual consideration of the measure did not begin until the Congress was within a fortnight of its final adjournment, in February, 1863. Meantime several incidents had seriously disturbed the Secretary of War. By means of papers captured outside of Washington, Stanton was even convinced that a member of the Court of Claims who was one of his own personal friends was involved in the Copperhead activities of the Knights of the Golden Circle. Competent press correspondents were writing their papers that the "Departments in Washington are swarming with traitors." A clerk in the office of the Adjutant General came under the shadow of suspicion as furnishing to the enemy the valuable information he was in position to acquire, and a brother of this employe in another department also was linked with disloyal machinations. The Secretary of War vehemently demanded action by Congress.

Senator Ira Harris had charge of the reorganization bill. He had been a lecturer in an Albany Law School and for twelve years a justice of the Supreme Court of the State of New York. The opponents of the measure at once brought into the open the undoubted fundamental intent of its sponsors. Said Senator Willard Saulsbury of Delaware: "It is well understood that the sole object of those who are advocating the passage of this bill is simply to get clear of

the present judges and substitute others in their places." In denying this charge, Senator Harris pointed to the failure of all attempts for codification. Had not Congress "been patching up the system for years"? It was "complicated, incongruous." The "fortunate time" for reform had arrived, for there was one vacancy on the bench, another judge was entirely superannuated, and there remained only two actually to be displaced.

The opposition resorted to dilatory tactics, seeking recommitment to the Judiciary Committee, asking for amendments, all without success. Admittedly the bill was not based on any petition from "the bar of the District or anybody else." Senator Garrett Davis of Kentucky did not hesitate to say that "if the incumbents of the court that now is proposed to be abolished were Republicans, and a Democrat, or a man who was not a Republican in his politics, filled the office of President of the United States, this majority of Republicans in the Senate would never pass this bill to remove, by a mode different from impeachment and more certain, the incumbents from office, and thus open the was for a Democratic President to fill their places." This Senator did manage to put before the Chamber a memorial signed by 49 members of the District bar, constituting the larger and more influential portion thereof, strenuously objecting to the measure, as "not called for by any public necessity" and "not acceptable to the mass of the people." There were long arguments on the constitutionality of the plan. Some heavy blows were struck by Senator Thomas H. Hicks of Maryland, a Republican, who opposed the bill. "While all things may be lawful, I do not believe all things expedient," he reasoned. "I am opposed to this constant innovation upon long-established precedent and usage, and I agree . . . that if the object is to reach any of the judges here . . . because of their secession principles, then bring them up for trial and turn them away; but do not attempt to break in on our judiciary system that has been tried for so long a time and has worked well . . ."

At length, all amendments having been voted down, Senator Harris having gone so far as to say he "understood the loyalty of one judge to be somewhat questionable," and Senator Wilson having specifically charged one member of the bench with treason, the bill went through. But the margin was narrow, 19 to 16. Among the "Yeas" were such men as William Pitt Fessenden of Maine, Henry S. Lane of Indiana and James H. Lane of Kansas, John Sherman of Ohio, Charles Sumner, Lyman Trumbull of Illinois, Benjamin F. Wade of Ohio, David Wilmot, the Pennsylvanian of "Proviso" fame. All on the majority side were Republicans. The minority comprised six Democrats, five Republicans, four "Unionists," and one "old-line Whig." The names are not so well known, Milton S. Latham of California, Henry M. Rice of Minnesota, Henry B. Anthony of Rhode Island, John S. Carlile, a Virginia "Unionist," John B. Henderson of Missouri, and, among others, William A. Richardson, a Democrat from Lincoln's own State.

In the House the debate was short and sharp. The very efficient Thaddeus Stevens objected to "any more debate," when in fact there had been none of any consequence. When a Representative asked to be allowed to put a single question, Stevens objected anew to "any more talking." "Just one question." "I object. I must pass this bill tonight." Clement L. Vallandigham of Ohio entered the fray: "I hope the gentleman from Pennsylvania will withdraw his objection for a moment." Stevens refused once, and again, and yet again. Representative John W. Crisfield of Maryland managed to edge in the statement that he "held in his hand" a "remonstrance of 3,000 citizens of the District" against the bill. The Speaker, Galusha A. Grow of Pennsylvania interrupted with "Debate is not in order."

Thereupon the "Yeas" and "Nays" were demanded, and the measure went through 86 to 59. A few hours later on that third day of March, 1863, the House adjurned sine die. That same day Secretary Nicolay brought the message to the Capitol that the President had "approved and signed" the bill.

The conflicting reactions of the resident population of the District to what had been ordained are readily deduced from the editorials which appeared respectively in the *National Intelligencer* and in the *Evening Star*. The former with effective irony disclaimed all insinuations upon the motives of any Senator. But a judge who "holds office under tenure of 'good behavior'" ought not to be "legislated out" of office. Also it "is surprising that in a District so largely governed by Maryland law the President could not find any resident member of the bar sufficiently able, upright and learned," for that new bench. However it was "a matter of congratulation" that the Act provides that the President shall appoint "a suitable person" for codification of the laws of the District. That done, these new judges will be able to make good their lack of familiarity with the laws they are to administer.

The *Star* was more direct and emphatic. "The nation never has had so deep a stake in the affairs of the District, far overshadowing any local considerations in the judgment of the Executive. The country holds him responsible that the administration of justice here shall tend, past preadventure, to conserve the government's hold upon the District. . . ." He must seek nominees "known to the whole country." Some of "our fellow citizens have preferred others on personal grounds, but as that which would please them would, of course, tend to endanger the safety of the State, it matters nothing whether they are pleased or not."

The Act creating this new Supreme Court practically adopted a system in use in New York with which Senator Harris was familiar. The first business of the new bench was the appointment of a clerk, and the selection of Return J. Meigs, who had long been in practice in New York, obtained the services of one especially qualified and whose work proved invaluable in promoting the success of the court. The new court was entrusted with all the jurisdiction its predecessor had possessed, and its powers were greater than those of any of the United States District Courts. The Act abolished the Circuit Court, District Court and Criminal Court of the District of Columbia, and "continued in force all laws in respect to such courts" so far as they would be applicable. The law vested the new court with "general jurisdiction in law and equity." As a solitary concession to local sentiment the powers of the Orphans' Court were not transferred until several years after.

For the Court thus established President Lincoln nominated as Chief Justice David Kellogg Cartter[1] of Ohio, and for Associate Justices Abram Baldwin Olin of New York, George Purnell Fisher of Delaware, and Andrew Wylie then residing in Washington.[2] The new

1. Cartter, not Carter, is the correct spelling.
2. It will be noticed that in this article the Circuit Court judges are referred to as "judges" and the Supreme Court

Chief Justice was a personal friend who had proved himself a masterly strategist at the Chicago convention of 1860 in obtaining the nomination of Lincoln for the Presidency. He was on intimate terms with such cabinet officers as Stanton and Seward and with such leaders in Congress as Wade and Chandler. He had abandoned the Democratic Party in 1856 and was pronounced the best of the stump speakers for Fremont in that campaign year. Both Mr. Olin and Mr. Fisher had been Republican members of the Congress which had just expired and both had supported the court bill. The former had been defeated for reelection to the House.

There was some trouble in executive session in the Senate over the confirmation of Mr. Wylie. He was a Pennsylvanian by birth, who had been educated in Indiana and had practiced law in Pittsburgh. Thence he removed to Washington, although maintaining his home in Alexandria, where he was said to have been the only man who voted for Lincoln in 1860. Through the influence of Secretary Stanton and Senator Lane of Indiana he had obtained from the President the nomination for the judgeship of the Criminal Court of the District which had been made vacant by the death of Judge Crawford. The Senate having abolished that court the President sent in his name for the new Supreme Court.

In the presence of a large number of the members of the bar of the District the court organized on March 23. The Chief Justice in his address called attention to new rules and regulations and stated that the judges had agreed on consultation to require all practitioners to take the oath of loyalty which had been enacted by Congress the previous year, commonly called "the ironclad oath." It applied to all civil, military and naval officials, excepting only the President. The new bench therefore included the attorneys of Washington in its scope. The court had to earn the popularity which in time it acquired, but two at least of the most eminent attorneys of the District refused to take the oath and never appeared before the court.

The new Chief Justice was a "character" generally described as able, courageous, loyal both to the Union and to the law. Anybody wishing to see a jurist in a fury had only to omit the extra "t" in the spelling of his name. He hated slavery intensely, but he sided with the President in holding that the Fugitive Slave Law must be obeyed until it should cease to be a law. On the other hand, Lincoln's Attorney General, Edward Bates, described Chief Justice Cartter as "a fierce partizan, an ill-bred vulgarian, and a truculent ignoramus." Another Cabinet member, Gideon Welles, four months after the death of Lincoln, confided to his Diary the opinion that the Chief Justice was a man of "vigorous as well as vulgar intellect" and "coarse and strong-minded," and two years later the Secretary pronounced Cartter to be "a creature of Stanton."

The first case of historic interest to come before the court turned upon the vexed question of the legal status of a runaway slave. An attractive Negro youth, one Andrew Hall, who had been arrested as a fugitive slave, claimed to have been "unlawfully disseized" of his liberty and to be illegally held in custody by Ward Hill Lamon, the Marshal of the District. His attorneys sought to obtain his release on a writ of habeas corpus. The issue was argued twice and the judges divided equally, the Chief Justice and Justice Fisher holding that the court had the power to execute the fugitive slave law. In the end the Negro was restored to his Maryland master, as the Emancipation Proclamation applied only to States in rebellion, and Maryland had not rebelled. In that first year of the existence of the court fifteen slaves in all were sent back to their owners.

The courage and independence of Justice Wylie were impressively exemplified in 1865. The military court established for the purpose had completed the trial of the conspirators charged with the slaying of the President and four of them had been condemned to death. In a final desperate attempt to save the life of Mrs. Surratt her attorneys applied to the Supreme Court of the District for a habeas corpus writ. Long before dawn they came to the home of Justice Wylie. They pleaded that the illegality of the trial and sentence of Mrs. Surratt by a military commission, and the consequent illegality of her detention by the military authorities for execution, constituted sufficient ground for such action. Justice Wylie listened with grave attention to their arguments, retired to consult his wife, and returned to say that he might himself be lodged in jail for what he was about to do. In disregard of the hysterical state of the public mind, and in pursuance of what he conceived to be his duty, he issued the writ.

The next morning, while a large company of spectators waited in the yard of the Capitol Prison, an army officer accompanied by the United States Attorney General, came to the home of Justice Wylie and informed him of their refusal to obey the writ on the ground of its suspension by the President, and the execution proceeded.

Two years later, as it happened, the Delaware "Unionist" who had been given a seat on the bench partly in reward for his loyalty, Justice Fisher, presided in the trial of John H. Surratt. The dispossessed Justice Merrick, let it be noted, by appointment of President Cleveland, served as an Associate Justice of this same Supreme Court from 1885 until his death in 1889.

None of the biographers of Abraham Lincoln has dealt with this episode in his life. Beyond question he could have prevented what was done. With hardly a doubt he considered it wise amidst the turmoil in which the capital was submerged to take the extreme course which was adopted to ensure the existence of a court that would command the full confidence of the leaders of his party and the loyalists everywhere, both conservatives and radicals. He could have blocked the legislation, or he could have vetoed the bill. The situation was unprecedented and he countenanced an unprecedented action. Lincoln as in other instances in his life assented to the use of the shortest and surest means of reaching a desired end. The courts must not only be loyal but they must seem to be loyal. The viewpoint of the radicals was stated with curt brevity by Albert G. Riddle, of Ohio, a member of the 37th Congress and an uncompromising belligerent. He said: "The Supreme Court of the District of Columbia was a court of *our* creation and for which we cleared the ground by sweeping the alleged disloyal Circuit Court from the boards."

judges as "justices." This distinction was made when Congress passed the Act of abolition of the old and organization of the new court for the District.

A BRIEF SURVEY OF LEGAL PERIODICALS

Legal Periodicals in the United States Have Reached a Highly Functional Stage in the Evolutionary Process through Which They Have Progressed—This Process Will Doubtless Continue as New Opportunities for Greater Service Unfold—Early Characteristics and Aims of These Publications—Law School Periodicals, Bar Association Journals and Specialized and Publisher's Periodicals—Critical and Humorous Observations—Conclusions.*

By William E. Reese
Editor Federal Bar Association Journal

A SURVEY of this character necessarily involves a brief historical review. The first distinctively legal periodical published in England was the Lawyers' Magazine, London, 1761-1762. The first American legal periodical was the American Law Journal and Miscellaneous Repertory, published in Philadelphia, 1807-1817. The first American law school periodical was the Journal of the Law School and of the Moot Court Attached to It, at Needham, Virginia, of which only one volume was published in 1822.[1] During the first half of the nineteenth century the publication of periodicals was greatly stimulated by four events.[2] The first of these was the opening of the mails to books and packages, thus enabling publishers to find a large class of general readers whose interests were centered on a common object or profession. Next came the Federal Copyright Act of 1831,[3] which gave to authors and their legal representatives the sole right to their literary productions for twenty-eight years with the privilege of renewal for fourteen years. In 1838 all railroads[4] were made available for forwarding the mails and, finally, the Federal Act of 1845,[5] which specified special rates for magazines and pamphlets, added the finishing touch to the setting which was necessary for the rapid growth of magazines. The specialization which was already under way in the three professions, medicine, theology and law, now made real headway. Numerous legal periodicals made their appearance but few were able to stand the trying test of time. One outstanding exception was that of the Legal Intelligencer, published in Philadelphia in 1843. This periodical, which is still in existence, enjoys the distinction of being "the oldest law journal in the United States."

Early Characteristics and Aims

Following the lead set in 1829 by the American Jurist, the most important legal publications, up to near the beginning of the twentieth century, sought to be national in scope. Legal periodicals from the beginning have freely criticized the law making activities of legislators and of judges. Judge Simeon E. Baldwin points out[6] that the editors of one of our earliest periodicals, the United States Law Journal, New Haven, 1822-1826, seemed to consider criticism their first duty. Many of our earlier legal periodicals were imbued with the idea that the diversity of law between the states offered the principal justification for their existence. Others stressed the necessity for reporting decided cases. One historian[7] observes that in 1807 John E. Hall of Baltimore announced to the legal profession his intention to publish a legal periodical, "in order to make the decided cases more quickly accessible to the Bar and more widely spread." A periodical, the Journal of Law, stated in an editorial in its initial number, "Our aim will be to afford to our readers instruction without tediousness, and amusement without frivolity." Evidently its readers did not appreciate its aims for it lasted only one year, 1830-1831.

Classification of Legal Periodicals

In an article published in 1929,[8] Roscoe Pound distinguished three types of legal periodicals, a predominantly academic type, a predominantly professional type and a mixed type. The purely academic type he characterizes as Continental, the purely professional type as English and the mixed, or academic-professional type as American. We are here concerned with the latter or American type from which he points out four forms of periodicals have developed; the law school periodical; the bar association journal, national, state and local; the specialized periodical; and the book publisher's periodical.

Law School Periodicals

Practically all law school periodicals follow the usual law review form, namely, leading articles, editorial or student notes, recent decisions and book reviews. Usually they are called reviews although in some instances they are known as journals, such, for instance, as the Yale Law Journal, the Georgetown Law Journal and the Kentucky Law Journal. A few of the law reviews, including Harvard, Co-

* Address delivered before a luncheon of the Federal Bar Association, Washington, D. C., January 12, 1938.

1. Hicks, Materials and Methods of Legal Research, 2d Ed., Chapter XI.
2. McMaster, History of the People of the United States, 5: 272.
3. 4 Stat. 436.
4. The act of July 7, 1838, 5 Stat. 283, constituted each railroad "a post route, and the Postmaster General shall cause the mail to be transported thereon, provided he can have it done upon reasonable terms, and not paying therefor in any instance more than twenty-five per centum over and above what similar transportation would cost in post coaches."
5. 5 Stat. 733.
6. American Bar Association Journal, 4: 37-53, January, 1918.
7. Warren, History of the American Bar, 338-40.
8. Types of Legal Periodicals, 14 Iowa L. Rev. 257.

lumbia, Virginia, Michigan and Pennsylvania, are published monthly, although most of them are published quarterly. A few are published bi-monthly. The modern law review is typically American in that it is at the same time academic and professional. Its development has been an evolutionary process. Early law school periodicals gradually moved in the direction of the form found in the Law Quarterly Review in 1885. It has been pointed out[9] that the Harvard Law Review drew on the form of this periodical and that of three earlier ones[10] for "the model of a new start in 1887." Prior to that time there were no law school reviews, as we now know them. The Columbia Law Review was one of the first to follow the Harvard Law Review in point of time. The Virginia Law Review also was patterned along Harvard lines.[11] By 1937 law school reviews were being published in fifty law schools.[12]

Many sound reasons have been advanced for the steady growth of law reviews. Perhaps the most convincing reason is that a primary function of every law school review is that of service to the student body, acting as a forum for extracurricular activity. Other reasons assigned are the absence of commercialism, as law reviews enjoy institutional sponsorship; and the intellectual appeal exerted over the practicing attorney who is anxious to keep informed. In fact, many regular contributors to law school reviews received their early training in editorial review work. It is of interest to note that the late Justice Holmes served as managing editor of the American Law Review from 1870 to 1873.[13] The law school reviews are generally credited with having greatly stimulated scholarly research.[14] Many law school periodicals rank high in legal literature. There is an ever increasing number of references in court decisions to constructive critical articles in legal periodicals. A survey[15] one American judges in eighty different opinions, covering approximately one year showed that sixty-cited such articles and case comments one hundred and sixty-one times. Twenty-seven different law reviews were cited.

The Illinois Law Review in 1906 introduced an innovation in the field of law reviews by the announcement of a new objective—"A live periodical primarily devoted to the discussion and exposition of Illinois law, and of matters of special practical value to the Illinois bar." This deviation from the national trend, which had been set in 1829 by the American Jurist, has opened up a broad and useful field for law reviews. There exists a clear need for this type of periodical. It performs functions which cannot be exercised by a review national in scope, which must publish material of more general interest. A recent contributor[16] in this field concludes that a review which covers the law of its state is bound to be of value to the people of that state. He offers six suggestions for state law reviews, as follows: (a) critical analysis of state supreme court decisions, pointing out new legal principles and their effect; (b) review of new state legislation; (c) suggestions as to changes needed in the law; (d) interpretation of the restatement of the law; (e) leading articles dealing with current state problems; (f) reviews of books dealing with the law of the state.

Bar Association Journals

Law reviews are more numerous than bar periodicals, but the growth of the latter has been rapid in recent years. This has been due in large part to an awakened sense of responsibility on the part of the individual members of the bar, a desire to improve the law and to keep it in step with advancing economic and social conditions. The following objectives quoted from the editorial section of a St. Louis[17] periodical illustrate functions typical of this class of periodicals: (1) Unite all members of the Bar in good standing in St. Louis; (2) Protect the public and our profession by restricting the practice of law to those legally qualified to practice in our courts; (3) Take the judiciary out of politics; (4) Restore public confidence in the Bar.

At the present time the number of national bar publications is limited. The most outstanding of these is the American Bar Association Journal. The Journal of the American Judicature Society is also a national periodical of unusual scope and influence. The Society was organized over twenty-five years ago. It is a "medium for the forty-eight state associations of the bar focusing thought and experience throughout the entire country upon problems with which all are concerned."[18] Notable among the reform measures it has been largely instrumental in promoting may be mentioned the drive for efficient organization of state courts, improvement of procedure through the judicial rule making power, judicial councils as organs of both bench and bar, methods of selecting judges, and integration of the profession. Its first president was Honorable Charles Evans Hughes, who resigned when appointed Chief Justice of the United States. He was succeeded by the late Honorable Newton D. Baker. The Federal Bar Association Journal properly falls under the national classification, since the Association is national and the scope of the Journal is national in character, dealing almost exclusively with Federal laws and activities. The latest venture in the field of national bar periodicals appeared in December, 1937, The National Lawyers' Guild Quarterly, published by the Lawyers' Guild.

There are numerous periodicals published by state and local bar organizations and the number is constantly growing. The most recent addition to this list is the Texas Bar Journal, the first issue of which appeared in January, 1938. The President of the Texas Bar Association states that its chief objective is "to render a service to the profession in

9. Pound, Types of Legal Periodicals (1929), 14 Iowa L. Rev. 257.
10. The American Law Register; The American Law Review; and the Albany Law Journal.
11. Glenn, Law Reviews—Notes of an Antediluvian (1936), 23 Va. L. Rev. 46.
12. McKelvey, The Law School Review (1937), 50 Harvard L. Rev. 868.
13. Schriver, Justice Oliver Wendell Holmes; His Book Notices and Uncollected Letters and Papers (1936), p. VII.
14. Cavers, New Field for the Legal Periodical (1936), 23 Va. L. Rev. 1.
15. Maggs, Concerning the Extent to Which the Law Review Contributes to the Development of the Law (1930), 3 So. Calif. L. Rev. 181.
16. Werner, The Need for State Reviews (1936), 23 Va. L. Rev. 49.
17. The Bench and Bar, official publication of the Lawyers' Association of Eighth Judicial Circuit of Missouri.
18. Shafroth, American Judicature Society to Expand Activities (1937), Bench and Bar (December).

Texas."[19] The style and content of the state and local bar periodicals vary largely with state and local needs. The style differs from that of law reviews in that it is less formal, less academic, and largely professional. In some instances the state bar association has combined its reports with a state law review. This occurred in the case of the Minnesota Bar Association and the Minnesota Law Review. Other state bar periodicals have various working arrangements with their law schools. The "Current Law Section" of the Illinois Bar Journal, for instance, is prepared by the faculty and students of the University of Illinois Law School.

One outstanding difference between bar association periodicals and law reviews is that the latter enjoy institutional sponsorship and the decided advantages flowing from such a relationship. The former labor under numerous disadvantages which in many instances inevitably affect the character of their periodicals. Some of these disadvantages are lack of regularly allotted funds, lack of permanent editorial staffs and office assistance, and lack of adequate assistance available to institutional periodicals through utilization of the student body. On the other hand, the law reviews are less fortunate than the bar periodicals in some respects. The latter are more likely to be free from the influence of ultra conservative tradition, which in some instances may characterize institutionally sponsored periodicals. A less dignified mode of expression sometimes may be more effective than the strictly conventional. Circumlocution, which some of the more conservative forums are inclined to condone, may tend to confuse rather than clarify. Also, bar periodicals are managed and in many instances largely edited by practicing lawyers who are prone to emphasize the practical rather than the theoretical or institutional side of law and related problems.

The Specialized and the Publisher's Periodicals

The necessity for specialization in the various fields of law also created the need for specialized periodicals. There are today numerous periodicals of this type covering, for instance, the law of bankruptcy, international law, labor law, school law, banking law, patent and trade mark law, corporation law, and insurance law. Such periodicals keep the specialized practitioners informed on developments and trends. They furnish a vehicle for critical analysis of the latest statutory provisions, for the publication and discussion of related administrative regulations and rulings, for discussion and critical analysis of current decisions of the courts, for dissemination of the views of specialized practitioners and serve as a forum for discussion of needed changes and reforms.

It has been said[20] that the Legal Bibliography of 1882 was perhaps the prototype for publishers' periodicals. Many of the law book publishers maintain such periodicals to serve as a medium for news relative to their publications. Some of these periodicals contain material of interest and value, especially to the student of law.

Critical and Humorous Observations

Legal periodicals frequently are subjected to criticism with respect to duplication. This problem has been under consideration for some time by a special committee of the American Bar Association and in its report for 1937[21] it concluded as follows:

"Also there are undoubtedly too many legal periodicals. Of these, the greater number are issued by or under the auspices of law schools. Much as we may deplore the ever increasing number of these periodicals—there are now at least fifty of them—each has certain unique opportunities. The quality, perhaps, is not always of the highest, but there is here little of what might strictly be called duplication."

Criticism is often directed at the style, function and aim of legal periodicals. One of the most spicy tirades in these respects appeared quite recently in a law review by a frequent contributor[22] to legal periodicals. He criticizes law reviews for their conservative style and pennyweight content and compares them to an elephant trying to swat a fly. He observes that they would rather be dignified and ignored; that if a law review writer wants to say that a court decision is stupid, he would say—"it would seem that a contrary conclusion might perhaps have been better justified." He likens "it would seem" to the "matriarch of mollycoddle phrases still revered by the law review in the dull name of dignity." He also portrays the professors and would be professors who contribute to law reviews, as in many instances endeavoring to break into print to influence their deans for purposes of advancement; and the students, contributing to such periodicals, as following the lead set by their professors in order to enhance their chances of finding employment upon graduation. The law offices are pictured as utilizing the law reviews in much the same manner as a plumber uses a piece of lead pipe, by putting them away on a shelf for future use. The portrayal is concluded in summary form, which admits of no paraphrasing, as follows:

"Thus everybody connected with the law review has some sort of bread to butter, in a nice way of course, and all of them—professors, students, and practicing lawyers—are quite content to go on buttering their own and each others bread. It is a pretty little family picture."

A happy refutation to some of the foregoing observations may be found in the following excerpt from a contemporary writer[23] on the same subject:

"Manners really help out in the long run. It may be tiresome to say, I submit that this is erroneous instead of saying 'It is a lie', but a roundabout method of assertion often makes life more pleasant, nor does it involve any sacrifice of conviction. That is why an old fashioned lawyer refers to opposing counsel as 'My learned friend' instead of dubbing him, 'My antagonist.' Anyhow, the institutional always carries with it the idea of decency and order, as the canons have it, and that is why these law reviews, attached as they are to institutions, observe the conventions."

Conclusions

Legal periodicals in the United States have reached a highly functional stage in the evolution-

(*Continued on page* 165)

19. Simmons, A Voice for the Bar (1938), 1 Texas Bar Journal 5.
20. Pound, Types of Legal Periodicals (1929), 14 Iowa L. Rev. 257.
21. American Bar Association Advance Program, p. 285.
22. Rodell, Goodbye to Law Reviews (1936), 23 Va. L. Rev. 38.
23. Glenn, Law Reviews—Notes of an Antediluvian (1936), 23 Va. L. Rev. 46.

THE INDEPENDENT JUDICIARY AND ITS MISSION

Remarks of Chief Justice Cureton of the Supreme Court of Texas at a Banquet in His Honor at Austin

THE judges and lawyers of Texas met in Austin on November 12th, to give a dinner, and unveil a portrait, in honor of Chief Justice Cureton of the Supreme Court of Texas. It was one of the most distinguished occasions in the history of the profession of the law in the Lone Star State, and the classic response of the honor guest deserves reading by every lawyer charged with judicial or quasi-judicial responsibility. It is reported in the attractive first issue of the *Texas Bar Journal* as follows:

"It is now nearly thirty years since I entered public life, and to all who thought well of me and furthered my fortunes, I return my heartfelt thanks. As best I could, I have tried to be worthy of their confidence. Words fail me when I attempt to express my feelings towards those who have made this proceeding possible. My wife and I shall carry with us to our final resting place beside the little stream where we spent our youth and our courtship the memories of this occasion.

"Of course, I know full well the conditions and circumstances which prompted my friends to have this portrait painted at this time. I have already heard the footsteps of the ever-marching years as they walk beside me. The frosts are falling, and there is snow upon my temples. When winter comes, one by one the leaves fall; and even the mightiest oak must stand naked and alone, and then lie down in eternal rest. I cannot hope to escape the common fate of all living things, and I am grateful that you have sought to preserve some memory of my life's journey. It would ill become me to say that you have acted wisely in thus paying tribute to one so humble—for, as to that, only time can tell. But that you have acted generously and gently, all will agree.

"I am not so vain as to believe that this occasion is purely a tribute to me. Rather, I think the occasion is in a great measure inspired by your regard for the judiciary and the Court over which I preside. After all, I have done but little and the Court has done much. Through the opinion of the judge, the Court as a whole speaks. If the opinion is a wise and courageous one, it speaks the wisdom and the courage of the Court rather than of the individual. With such associates as I had on the old Court and with such associates as I now have, I would find great difficulty in doing or writing foolish things. My associates on the bench have been and are such that they would have made or would make a fair judge out of any man—even of one of my limited ability. I have listened to them with care, appropriated their words of wisdom, incorporated their genius in my opinions, and tonight I publicly acknowledge my obligations to them. In these strange times, when there is some sentiment for rending asunder the fundamentals of constitutional government, the judiciary of the Nation has stood firm, and it must yet stand, I fear, as Jackson stood upon the battle field. So long as I serve you, I pray that I may have the strength and the wisdom to act justly and courageously.

"This year is the 150th anniversary of the formation of the Constitution of the United States, under which the judicial power was made one of the three great divisions of government. It was intended that this power should be independent of the executive and legislative departments, and supreme within its own sphere. The Constitution declares in its preamble that one of its purposes was to 'establish justice,' and that another was to 'secure the blessings of liberty to ourselves and to our posterity.' By 'liberty' was meant not only political liberty, not just *some* liberty, but *all* liberty, political liberty, freedom of trade and commerce and travel, the freedom to own and use property, to plant, to sow, and to reap; personal liberty, freedom of speech, freedom of religion, freedom in all righteous things. In short, liberty meant then, as it means now, the right to do anything on earth you desire to do, so long as you do not impinge upon or restrict the equal rights of another. This was the precious heritage the Constitution sought to guard, and for the maintenance of which an independent judiciary was established. Those who formed the Constitution had before them the history of the long conflict between the great common law Courts on the one side, trying to maintain English freedom, and the trespasses of the Crown, and its favorites, to restrict, regiment, and degrade English freedom.

"The Constitution declares that might does not make right, and that the voice of the majority shall never be loud enough, nor the power of government strong enough, to destroy or restrict the just liberties of the humblest citizen. By the light of this constitutional philosophy the dark places of the world have been illumed. Our people, in that hope and ambition that springs from freedom, went forth to conquer, to build, to sow and to reap, to live and to enjoy. In the lifetimes of two generations they have conquered a continent, and placed not only the necessities but the luxuries of life in more homes and before more people than obtains in all the balance of the world combined. Our civilization is the child of freedom, and that the freedom of the individual.

"It was for the preservation of this individual freedom, complete liberty in all just and righteous things, that an independent judiciary was created. The will of the majority has nothing to do with constitutional freedom. Under the Constitution you have a right to be free, and if you maintain an independent, courageous judiciary, you will be free, whether the majority will it or not. Face to face with a fundamental constitutional right, the adverse cries of a majority are unheard by a courageous Court, for the voice of the Constitution is strong and firm, and majorities and minorities alike must bow to its mandates. To be free, you must be free from governmental restraint, where your actions do not impinge on the equal rights of others.

"Unjust restriction of liberty, revolution, and then dissolution, are the last three chapters in the history of all fallen nations. Against these a great independent judiciary, a new thing in governmental history, was erected by the Constitution. And let us hope that, with the aid of this judiciary, State and National, we may escape the common fate of empires. At any rate let us hope that the American judiciary, when freedom under the Constitution is attacked, will stand as stood Horatius at the bridge."

CHAIRMEN OF ASSOCIATION COMMITTEES FOR 1937-38

"MEMORIES OF A HALF CENTURY AT THE NEW JERSEY BAR"

A New Jersey State Bar Association Project Which Other Organizations Might Well Follow

"I AM NOT surprised that I have had lots of fun during this half century of pretty arduous work," writes Robert H. McCarter in preface to his gusty and delightful *Memories*[1] of a span of great years. "I scoff at the idea that the practice of law is dull, or that the law itself is dry as dust." The Nestor and beloved friend of the lawyers and of all who have to do with the administration of justice in New Jersey then puts to paper an animated and moving chronicle of men and events that supports fully his mature and hearty outlook on the life and the work of the lawyer in general practice.

This book is a project of The New Jersey State Bar Association, and is published under its auspices, because of the belief of leaders of the Association that it ought to bring about the recording of the illustrious history of its judges and lawyers, while the man best qualified to write of those stirring years was alive and able to give his recollections. The State Association in New Jersey has undoubtedly furnished a good precedent for a like activity on the part of the organized Bar in other States. At a time when it is often feared that the great traditions of the Bar are passing from observance and even from memory, such a history as "Bob" McCarter has written in the golden sunshine of a rugged life is a heritage of the Bar in all the years to come. Time is of the essence of the accomplishment of such a task, and The New Jersey State Bar Association acted in good time. For the possible assistance of other States, I quote Mr. McCarter's account of the way in which he was persuaded to write this memoir:

"During the early winter of 1936, I was invited to meet some friends at luncheon. I accepted the invitation without the slightest suspicion that the occasion was anything more than a pleasant gathering. I was told, however, after we were seated at the table, that those present—about six in number—were a committee of the New Jersey State Bar Association who felt, with many other members, that some effort should be made to acquaint the Bar of the State, particularly its junior members, with some of the Bench and Bar of former days, and thereby ascertain what a proud record we have, and what character and learning they possessed. That it was also felt that my long practice had qualified me to enlighten them from my own experience, and they, therefore, hoped that I would write down my impressions of them. After a few days' reflection, I accepted the invitation—hence this book. Nothing but the evident sincerity of the request would have prompted me to think any experience of mine was of sufficient importance to be put in book form."

A great sense of perspective is gained from these pages—an amazing realization of how fast and how far the profession of law has traveled, during the span of the life of a lawyer still busy at the counsel table. Mr. McCarter's chronicle begins with his admission to the Bar of his State in November of 1882. "Those were simple days," in which "few went to the law schools, of which there were then not many in this country." The duties of a "clerkship" in a New Jersey law office were "largely devoted to copying papers in longhand." The "typewriting machine was hardly invented"; Mr. McCarter recalls the amazement with which he first watched the manipulation of such a machine. Law "students in those days were expected to pay for the privilege of studying in a good law office." There were no telephones, and the "clerks" went on foot to carry messages now handled by telephone. Theodore W. Dwight of the Law School of Columbia College was "the finest teacher I ever had." Neophytes of the Bar became proficient in trover and conversion, and in hand-drawn (and so meticulous) pleadings of which copies could be made only by hand or letterpress. Mr. McCarter recalls that "a great point was made of costs in those days, and our preceptors were experts in drawing up bills of costs, and all lawyers were avaricious in collecting them. There was a successful lawyer by the name of Cobb, who was in this regard particularly zealous, and it was said of him, that in his daily devotions, he amended the Lord's Prayer by saying 'Give us this day our daily bread, with costs.'"

It was not until the end of the author's three years of clerkship that the examinations for admission to the Bar first included a series of printed questions; "our class approached the ordeal of this new system with trepidation," but survived and surmounted it. At that time, there were only thirty-five volumes of New Jersey Equity Reports and only forty-four volumes of New Jersey Law Reports; the West System, including the Federal Reporter, had not been started; the first digest of New Jersey decisions had recently appeared, in two volumes.

The United States Circuit Courts of Appeals had not yet been established. At least once a year, Mr. Justice Bradley of the Supreme Court held jury trials in civil and criminal cases at Trenton or Newark. He would also come to New Jersey to hear important motions. "It was his practice, like most if not all of his associates, to ride the circuit, and attend at least once a year in all the districts of the Third Circuit."

In his vivid narrative of the fifty years which have followed, this leader of the Bar of New Jersey does not fall into any strain of claiming that "there were giants in those days"; he writes of an era in which lawyers were great individualists, intensely human, conscious of their part in a great profession, given to no questioning of the basic institutions of their country. "It may be, as many assert," he says, "that the times have changed; that a profession has degenerated into a trade, and that neither the lawyers nor the judges of the present time, are to be compared with those of whom I speak in this book. I do not want to acquiesce in this idea; but whether it be true or not, 'the past at least is secure'; and thank goodness, I have enough of the old spark left to be able to appreciate the ideals and doings of these worthies." Through the book runs a strain of evident belief that the "country-bred" men make the best lawyers, and that to stand independently on one's own feet as a lawyer in general

1. *Memories of a Half Century at the New Jersey Bar.* By Robert H. McCarter, LL.D. 172 pages with photographs. Published by The New Jersey State Bar Association. Printed and bound by The Haddon Craftsmen, Inc., Camden, New Jersey.

practice is a high privilege—at the least, a vocation in which there is "lots of fun."

And what a vista is given of the active work of the judges and lawyers of a State noted for its fine lawyers and rugged jurists! Mr. McCarter writes simply and without striving for effect—as simply as though he were talking to a jury in one of his beloved counties or to a group of cronies in a Newark club; but he makes storied figures of New Jersey jurisprudence seem to live again, as he sketches his recollections of great judges of State and Federal Courts, of some of "the mere lawyers I have known," and of interesting criminal and civil trials which are outstanding in the annals of his State. In noble procession, he tells of Beasley and DePue, Van Syckel and Magie, Gummere and Swayze, the Pitneys, the Garrisons, the Bergens, and a score of others—revered figures whom we who were very young saw only in the aura of aloof greatness or only heard of in the anecdotes told by older men. Back of the traditions of "Jersey justice" has been a rugged race of forthright and devoted men, who were deeply versed in the law and regarded impartial justice under law as one of organized society's greatest contributions to human happiness and welfare.

In these memoirs, one would search in vain for theories of the law or of the nature of the judicial process. Men like Beasley and Magie and Gummere knew nothing of neo-realism in jurisprudence; they had not heard that they were controlled by their "personal economic predilections"; they had not learned that the judiciary was supposed to be auxiliary to any other department of government. Swayed only by a passion for justice and armed with a belief that justice could be no respecter of persons or political parties, they thought deeply and wrote incisively; and many of their opinions are landmarks of the law of their State and their country. Likewise the lawyers who practiced before them were engaging and virile personalities, who served their clients with all of the arts at their command but laid aside their verbal weapons at night to dine with the judge and opposing counsel. It was an era in which judges and lawyers were conscious of their own rectitude and independence and integrity of mind, and held no fear of being corrupted or led astray by acquaintance. They were men unafraid—of themselves or of anyone else. If they had any ascendant philosophy, it was to find how few curbs and checks on individual liberty and opportunity were necessary to human happiness and welfare.

In the nature of things, these memoirs are a saga of those who succeeded; Mr. McCarter's Olympus contains no men who worked hard and sacrified much, but won no high place. Of rare occasions when he felt that partisanship or factionalism moved comparative mediocrity into high places, he writes scathingly, perhaps unjustly in one or two instances; but he gives no picture of the whole Bar of his State during the half century. We read of Lindabury and the Corbins, but find no word of the forgotten lawyers who in small communities led interesting and useful lives and constituted, as always, the backbone of the Bar, the true servants of the small enterprise and the average citizen. The author's racy anecdotes leave ground for suspecting that his unpublished—and perhaps unpublishable—*Memories* would be even better reading than the tales that are told.

Of many of the jurists and "mere lawyers" about whom these memoirs were written, as well as of their distinguished author, we may truly say, as Hamlet did of his father—

"He was a man; take him for all in all,
I shall not look upon his like again."

Gone are nearly all of those generations of mighty chieftains of the Bar who traveled the circuits, fought furious battles in the court-rooms, counseled great enterprises boldly to success, and had a large part in shaping the American tradition that the Courts are bulwarks of liberty. In their places stand lawyers generally of a different type—less forensic and spectacular than their predecessors now look to be, but better trained, more aware that the public interest deserves a place at every council table, and more adaptable to the vastly changed tasks devolving upon the profession. This is a good book for young men coming to the Bar to read and to own, because one turns from its pages to recall some recent events with a freshened confidence that in New Jersey, as in the other States, each generation of lawyers has produced, and will continue to produce, successors worthy of the old traditions—men who will serve their clients and the public faithfully, will help defend the basic institutions of their country, will do competent work from a sense of workmanship, and in the best spirit of "the old school" will have "lots of fun" in doing it.

WILLIAM L. RANSOM

Arrangements for Annual Meeting, Cleveland, Ohio

July 25-29, 1938

HEADQUARTERS—HOTEL CLEVELAND

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (dbl. bed) for 2 persons	Twin beds for 2 persons	Parlor Suites
CLEVELAND	$2.75 to $4.50	$4.50 to $6.50	$6 to $10	$12 & up
ALLERTON	2.25 to 3.50	3.75 to 5.00	4.50 to 6.00	10
CARTER	3.00 to 5.00	5.00 to 7.00	7 to 10	12 & up
HOLLENDEN	3.50 to 7.00	5.00 to 7.50	6 to 12	12 & up
STATLER	3.00 to 6.00	4.50 to 8.00	5 to 8	10 & up

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Executive Secretary, 1140 N. Dearborn St., Chicago, Illinois.

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

The "In Pari Delicto" Maxim Between Attorney and Client

ATTORNEYS represented a client in a suit in which a judgment for $10,000 was rendered against the client. Before it was docketed the client, upon the advice of his attorneys, conveyed to them four parcels of land worth $20,000, subject to a $4,000 mortgage, so as to defeat the judgment creditor, his attorneys stating that they would represent to the creditor that the conveyance to them was made in consideration of services rendered of the value of $7,500 and promising that they would hold the title for his benefit and reconvey the same to him upon request. In due course the $10,000 judgment was vacated. Upon request, the attorneys reconveyed by a deed, which the client failed to record. Thereafter, the client was sued by another plaintiff and was represented by the same attorneys. He redelivered the unrecorded deed to them upon their advice and upon their agreement to hold the property therein described for his benefit, to assert their fictitious rights thereto under the deed and reconvey to him or his nominee upon his request. Later they advised him that it would be necessary for them to file a friendly suit to have the deed declared to be a mere equitable mortgage to secure the $7,500 fictitious claim for fees and to foreclose the same and that he should permit a judgment to be rendered by default, stating that the property would nevertheless be reconveyed to him upon request. In consequence, a judgment of foreclosure was rendered and the land sold to the attorneys. The attorneys later claimed to be absolute owners of the property conveyed. To a complaint alleging the foregoing facts, a demurrer was sustained, without leave to amend, on the ground that the parties were guilty of fraud and collusion to defeat the plaintiff's creditor and that, since they were in pari delicto, a court of equity should give no relief. The court held it error to dismiss the suit, denying leave to amend, saying that, assuming the facts stated to be true, the complaint would state a cause of action if amended to include an allegation that plaintiffs had offered or are willing to pay the defendants the amount of the fees due them. The court said:

"The demurrer was sustained and the judgment was rendered in this case on the theory that the plaintiffs and defendants entered into collusion and wrongfully participated in the transactions described in the complaint for the purpose of defrauding the creditors of the plaintiffs. It is true that ordinarily a court of equity will not grant relief to either party to an action to set aside a judgment which has been procured by fraudulent collusion between them. . . There appears to be a well-recognized exception to the rule last stated. When the parties to the fraudulent transaction occupy a fiduciary relationship in regard thereto, such as client and attorney, and the client relies upon the advice and counsel of his attorney with relation thereto, it is held that the client is not in pari delicto with his attorney. Under such circumstances the attorney is deemed to be more culpable than his client, and equity may then relieve the client from the burden of an unjust and fraudulent judgment thus procured. Clark v. Millsap, 197 Cal. 765, 783, 242 P. 918, 925. In the case last cited, which was a suit instituted by a client against her attorney to compel an accounting of moneys turned over to him to defraud her creditors, the court said: 'The commonplace maxims of equity, 'He who seeks equity must do equity' and 'He who comes into a court of equity must come with clean hands,' have no application to the facts adduced in the instant case. Certainly the law will not hold a client in pari delicto with her attorney, who, acting under his influence and advice, places her property in his name and possession for purposes of concealment. As between the two, the client is not, in the eyes of the law as culpable as the legal adviser."

Division of Fees with Another Lawyer for Referring Business Improper

One attorney sought to compel another to account to him for fees received from certain clients referred by the plaintiff to the defendant under an agreement, whereby the defendant was to pay the plaintiff one-third of the gross fees received. In one matter, the plaintiff, because of his conflicting and adverse interest, was disqualified to represent the client. In the others, he could not do so because he had retired from the practice of law due to ill health. The agreement was held to be against public policy and unenforcible. Clark v. Robinson (App. Div. Second Dept.) 299 N. Y. S. 474.

It is interesting to note that this view completely accords with Canon 34, which now is as follows: "No division of fees for legal services is proper, except with another lawyer based upon a division of service or responsibility."

Until recently, Canon 34 contained the following sentence: "But sharing commissions between forwarder and receiver, at a commonly accepted rate, upon collection of liquidated commercial claims, though one be a lawyer and the other not, is not condemned hereby, where it is not prohibited by statute." Upon recommendation of its Committee on Professional Ethics and Grievances, the American Bar Association at the Kansas City meeting voted to omit this sentence.

Attorney Cannot Surrender License When Charges Against Him Are Pending

When charges are filed against a lawyer and disbarment is imminent, a voluntary surrender of the license is sometimes considered a cheap price to pay for escape from the resulting disgrace and shame. The Appellate Division of the Supreme Court of New York, however, recently refused to accept such a resignation where an attorney was charged with the conversion of funds belonging to another. In re Lyons, (App. Div. Third Dept.) 299 N. Y. S. 515.

Careless Quotations to Courts

A phase of the lawyer's duty to be frank and honest with the courts was emphasized by the Supreme Court of Rhode Island in Orleck v. Nemtzow, 195, Atl. 234, 240, when the Court said:

"The defendant argues that the decision of this court in Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429, is an authority in his favor on the point that we have just discussed and confronts us in his brief with an alleged quotation from that opinion in support of his claim. The Blaine Case is clearly not in point and the language as quoted is not to be found in the opinion. With considerable difficulty we discovered that the alleged quotation was a combination of disconnected phrases from widely separated parts of that opinion, without indicating intervening omissions. As this may have been due to oversight in revision,

we now say that it is the duty of counsel in every case to make certain that quotations from the decisions of this or any other court are truly and fairly presented and do not misrepresent the meaning of the language used by the court."

Disbarment for "Moral Turpitude"

An attorney in California was convicted of violating the Corporate Securities Act in having knowingly authorized, directed or aided in the issuance and sale of securities contrary to the act. When an attorney has been convicted of a felony or misdemeanor involving moral turpitude, it is provided by statute that, upon receipt by the court of the record of conviction, he must be suspended and must be permanently disbarred when the judgment of conviction has become final. The attorney contended that the offense of which he had been convicted did not involve moral turpitude. Denying the validity of this contention and sustaining the suspension, the Court said:

"'The concept of moral turpitude depends upon the state of public morals and may vary according to the community or the times.' In re Bartos (D. C.) 13 F 2d 138, 139. In Beck v. Stitzel, 21 Pa. 522, 524, citing among other cases, In re Coffey, supra, it was said: 'This element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community.' In the case of Rudolph v. United States, 6 F. 2d 487, 55 App. D. C. 362, 40 A.L.R. 1042, it was said: 'We are not much concerned with the distinction sought to be made between crimes malum in se and those which are merely malum prohibitum. Many things which were not considered criminal in the past have, with the advancement of civilization, been declared such by statute; and the commission of the offense, if it involves the violaton of a rule of public policy and morals is such an act as may involve moral turpitude'; and 'there is no hard and fast rule as to what constitutes moral turpitude. It cannot be measured by the nature or character of the offense, unless, of course, it be an offense inherently criminal, the very commission of which implies a base and depraved nature. The circumstances attendant upon the commission of the offense usually furnish the best guide.'

"In sustaining legislation of the charter of the Corporate Securities Act, it has been held that the general purpose and tenor of the act is to 'protect the public against the imposition of unsubstantial schemes and the securities based upon them' and against 'fraudulent or unlawful stock and investment schemes and enterprises'. . . It must necessarily follow that violations of the act are contrary to the concept of honesty and good morals where the intent is to evade its provisions with the object of gain or profit. Therefore, the stigma of moral turpitude may attend the violation of the statutory requirement that a permit must be obtained from a body constituted to supervise the details and guard the interests of the public against impositions and frauds before the issuance or sale of securities. This stigma would seem to attach to the conviction of an attorney who, as charged and found guilty, 'knowingly authorizes, directs, or aids in the issue and sale of' securities contrary to the provisions of the act where the circumstances indicate that the omission was not merely technical but was done with the object and design of evading compliance with the act. See also In re Diesen, 217 N. W. 356.

"The defendant claims that the failure to obtain the permit was in this case merely a technical omission, for which he should not be disbarred or suspended from the practice of law, relying on In re Kling, 186 P. 152. The fact of the record itself refutes the contention. Numerous persons to whom we may assume the securities were sold complained against the defendant. The defendant does not offer to show that his alleged 'technical' omission was cured by a dilatory application for a permit, or that a permit was subsequently granted. On the contrary the plain indication from the two classes of charges is that the defendant's purpose was to evade the necessity of a permit by purchasing the securities and reselling them as his personally owned property. The trial court apparently concluded that the acts of the defendant were of such a serious and dishonest character that protection to society demanded that he should not, during the period of probation, engage in the investment business or handle the money of other persons. It would be anomalous to conclude that he should nevertheless be permitted to continue in the practice of the law during that period. The same reason for requiring that he be restrained from further engaging in the business of making investments for others or in handling the property of others is persuasive that the motive and intent with which he acted was such as to indicate turpitude in the commission of the offenses of which he was convicted. The record of conviction therefore is sufficient upon which to dispose of the proceedings herein finally without a reference to and investigation and recommendation by the board of governors of the State Bar as to whether the defendant's acts involved moral turpitude." In re Hatch, 73 P. 2d 885, 887.

A Commendable Application of the Court's Inherent Power of Court to Disbar Attorneys

The State Bar of Michigan was created by judicial order subsequent to the passage of a statute empowering it to integrate the bar. The statute specified deceit, malpractice, crime, misdemeanor or wilful misfeasance as grounds for disbarment. A Grievance Committee found Hartford guilty of conspiring to obtain the illegal entry of an alien into the United States after he had been refused a visa by immigration authorities and recommended his disbarment. An order to show cause why the recommendation should not be adopted was issued and three circuit judges were appointed, *pursuant to statute,* to determine the issue. It was found that Hartford had written a letter to the immigrant, signing a fictitious name thereto, mentioning a date on which he would be in Detroit at a certain hotel, at which time he would have some fine air drills for his approval. The immigrant was to pretend to the immigration authorities that he was interested in the purchase of mining equipment, that he desired to visit Detroit for the purpose of inspecting such equipment and present the letter written by Hartford in proof of this if questioned by immigration authorities.

Hartford contended that he could not be disbarred because (1) the foregoing facts do not constitute a crime against the United States; (2) if guilty of a crime, he could not be disbarred therefor until convicted thereof; (3) he could be disbarred only upon the grounds set forth in the statute.

The Supreme Court of Michigan held all these arguments invalid and affirmed the order of disbarment, saying:

"However, aside from this question, we believe the record is replete with facts and circumstances that require affirmance of the judgment. It is clear that respondent attempted to effect the entry of Regan by deceit and fraudulent misrepresentations to be made to the immigration authorities by means of the fictitious letter and otherwise. His actions exhibit a gross disregard of the obligations imposed upon him by virtue of his status as an attorney and officer of the court, and are not compatible with the attitude and sense of moral responsibility which must be possessed by those with whom the administration of justice is intrusted if the respect and dignity of the courts is to be maintained. He has violated the confidence placed in him upon his admission to the bar as being one possessed of sufficient moral character to be entitled to engage in the practice of law, and has completely demon-

strated that he is a person wholly unfit to be permitted to continue in practice and exercise and hold the rights, obligations, and trusts which are imposed on every member of the profession. Respondent infers that he can be disbarred only for the reasons specified in the statute. Comp. Laws 1929, Sec. 13585, as amended by Pub. Acts 1931, No. 171. The power to disbar is inherent in the court and may be exercised for reasons other than those specified in the statute." State Bar of Michigan v Hartford, 275 N. W. 792.

This apparently sound view is in striking contrast to that taken by the Supreme Court of North Carolina in Committee on Grievances of State Bar Assn. v. Strickland, 200 N. C. 630; 158 S. E. 110, dissenting, where it was held that failure in an obvious attempt to follow the procedure prescribed by a statute in a disbarment proceeding prevented the courts from ordering disbarment, even though the facts stated were sufficient ground therefor; that the "judicial" method could not be applied where the statutory method was contemplated.

Attorneys as Witnesses

The Supreme Court of Errors of Connecticut recently had occasion to consider the propriety of an attorney's testifying in a case which he is conducting. The Court said:

"On occasions, happily infrequent, when the matter of acting in the dual capacity of counsel and witness has been before us, we have emphatically discountenanced the practice. When counsel becomes a witness in behalf of his client in the same cause on a material matter, not of a merely formal nature such as the attestation or custody of an instrument and the like, and not in an emergency to avoid defeat of the ends of justice but having knowledge that he would be required to be a witness in time to relinquish the case to other counsel, he violates a highly important rule of professional conduct now formally expressed in the Code of Professional Ethics, section 21, Practice Book, p. 16. Jennings Co., Inc. v. DiGenova, 107 Conn. 491, 499, 141 A. 866; Nanos v. Harrison, 97 Conn. 529, 530, 117 A. 803; Thresher v. Stonington Savings Bank, 68 Conn. 201, 206, 36 A. 38; French v. Waterbury, 72 Conn. 435, 437, 44 A. 740. However, the great weight of authority in this country holds that the impropriety of an attorney so testifying is a matter of professional etiquette and not one of strict law, and that the admission of testimony under such circumstances is not reversible error. Reliance has been placed, instead, upon 'the restraining influence of a professional education, and of the opinion of the bar and bench, and the liability to discipline for persistent misconduct, as competent to suppress evils of this character.' French v. Waterbury, supra, 72 Conn. 435, at page 437, 44 A. 740, 741; Kaeser v. Bloomer, 85 Conn. 209, 211, 82 A. 112, Ann. Cas. 1913B, 710, 49 L.R.A. (N.S.) 422, note; Jennings Co., Inc. v. DiGenova, supra, 107 Conn. 491, at page 500, 141 A 866; 28 R.C.L. 470; 70 C.J. p. 176. We have held in cases above cited that where an attorney has testified in a case in which he also appears as counsel, the admission of that testimony does not constitute reversible error, and as recently as Sengebush v. Edgerton (1935) 120 Conn. 367, 370, 180 A. 694, that an attorney participating in the trial of a case is not thereby rendered legally incompetent to testify, and if he offers to do so 'the court could not treat him as disqualfied, but the most it could do would be to remind him of the impropriety of his conduct.'

"Therefore, since the facts found appear to negative the existence of any unforeseen emergency necessitating the intervention of the attorney as a witness, and disclose no offer on his part or behalf to retire and leave further conduct of the case entirely to his associate, the offer to testify was ethically improper, but the exclusion of the testimony, on that ground, was legally erroneous." Miller v. Urban, 195 Atl. 193, 194. H. W. ARANT.

MOSCOW'S LAW INSTITUTE

BY JOHN N. HAZARD*

GONE are the days when an untrained worker was called from his job to act as prosecutor or sit upon the bench and administer revolutionary justice. During the early years of the revolution when an outgrown government machine was in process of liquidation, when no one had been trained in law and procedure as needed for the new society, judicial personnel could be recruited only from the working class. Their background raised the presumption that they could be trusted as good revolutionaries. This major principle came first, and faultless legal application by trained Soviet jurists had to wait until schools could prepare them.

Today's Soviet Union is far from that early war-torn country of twenty years ago. Spurred on by Stalin's now-famous words, "Cadres decide everything"[1] educational forces within the Union have increased their efforts to improve personnel. Legal institutions have not lagged behind.

Under the supervision of the newly created Commissariat of Justice for the U. S. S. R.,[2] the Moscow Law Institute heads a group of eight Institutes and also three Faculties of Law within outlying Universities,[3] each teaching in the language of the Republic in which it lies. Moscow's Institute draws from all regions. Ukrainians, Georgians, Jews, Uzbecks, Turkomen, Tadjiks, Soviet White Russians, Bashkirs, Ossetians, Soviet Finns and Esthonians to a total of thirty-nine nationality groups are enrolled, all studying in their international language of Russian. Girls now account for some 25 per cent of the student body which has reached the eight hundred mark.

With the adoption of the new Stalin Constitution and the passing of the old period in which it was necessary to change legislation frequently to keep pace with rapidly changing conditions, much greater interest in law is developing. This has been reflected in the growing number of applications for admission to a course which has grown from its modest beginning of

*Mr. Hazard has just completed a course at the Moscow Law Institute, as a student under the auspices of the Institute of Current World Affairs, with headquarters in New York.

1. Address to Red Army Graduates, May 14, 1935., See *Soviet Union, 1935*, (Moscow, 1935) p. 7.

2. Law of July 20, 1936—*Collection of Laws, U.S.S.R.*, 1936, I, No. 40, Art. 338.

3. Moscow, Leningrad, Saratov, Kazan, Sverdlovsk, Kharkov, Minsk, Tashkent, The State Universities of Georgia, and Armenia, and the Baku Social-Economic Institute—Law of Mar. 5, 1935, *Collection of Laws, U.S.S.R.*, 1935, I, No. 13,

two years duration through a three-year term to this season's four- year program. Under the new law permitting entrance on certificate to those who receive in the middle schools a grade of excellent in all their major courses and not less than good in minor ones, the majority of this year's entering class qualified without the entrance tests, given to the others in Russian, mathematics, physics, chemistry and political education.

The average age of students shows a marked decline over former years, the first year class now including 25.6% below 20 years of age, 44.6% between 20 and 25, and only 29.5% above 25. At the same time the percentage of students with Young Communist League affiliations or Party membership has been reduced, due in part to last winter's decree[4] forbidding consideration of class origin of students applying for admission to Institutes of Higher Learning. Students from non-Party and non-Young Communist League groups have now increased from only 5.5% in last year's entering class to 27% in this year's.

Pedagogical methods have been revolutionized in keeping with the new decree on organization of Institutes of Higher Learning.[5] Insufficient self-discipline in a student body which had grown up during the uncontrolled days of the Civil Wars had made necessary a form of now outworn recitation procedure. With the coming of a new generation, not only trained but even born since the Revolution, rigid control with its resultant curb on initiative has been abandoned. The new decree demands that question sessions be abolished, leaving in their stead seminar sessions in which the students in the advanced courses will read papers and will study cases appearing in the practice of the day. Traditional two-hour lectures will remain as the backbone of the program. Here are the first signs of a modified case system, a combination of lecture material and cases to illustrate the points.

Because students come without previous University training and with only an equivalent of Junior High School education, the curriculum leaves the study of special branches of the law to later years and begins with more basic subjects in history and theory. Lenin's admonition is carefully followed. He urged students "to cast an historical glance even though momentary on the method in which the state and law have arisen and developed."[6]

In consequence, the curriculum includes courses in the general theory of law, the history of the state and of law throughout the world and in particular among the peoples of the Soviet Union, and a survey course on the Soviet governmental apparatus and administrative law. Political economy, history of the Communist Party, and philosophy are taught here as in all Institutes of any kind. These two basic groups are filled out by Latin and one of three foreign languages (English, German, or French), together with gymnastics and military science.

The second year sees a continuation of basic courses, such a dialectic materialism, Leninism (Marxism as applied to conditions of an Imperialistic world) and economic policy (the application of the principles of political economy within the U. S. S. R.). The course on the Soviet governmental apparatus and administrative law is continued, and to it is added a survey of the governmental structure of bourgeois countries. Courses in the Court system of the U. S. S. R., and in the general principles of Criminal and Civil law start the student on his first pure study of law. He continues his foreign language and gymnastics, and also takes a course in statistics.

With the third year the study of law begins in earnest. There are major courses in civil and economic law, criminal law, civil and criminal procedure, labor law, the constitution of the U. S. S. R., and transport law. Up to the fall of 1937 the third year students chose the field of law in which they intended to specialize—civil or criminal, but this division was eliminated in the program appearing with the opening of the 1937 school year. Those who chose the criminal field will be judges, prosecutors, or practicing attorneys. Those who chose the civil field will later take positions as consultants in Soviet economic organs and corporations. Each group did more extensive work in its chosen field than the other, although each group took the major courses in the other field. Special courses for the criminalist included criminology, court medicine, court psychiatry and psychology. Civilists majored in credit law, housing laws, and advanced labor law.

The fourth year brings the course to a close with international public and private law, family law, procedure in the state arbitration tribunals and special advanced courses in the chosen field as well as the fourth year of the chosen foreign language.

But classroom work is not all that is provided by a Soviet Institute. Every member of the second and third year classes is placed in a court, administrative bureau, government corporation, or prosecutor's office for actual contact with the work for which the student is preparing. This practice covers two months each year.

Each year an actual session of the Moscow City Court (with jurisdiction over serious criminal offenses) is held in the big lecture hall, classes being halted during its two to three-day duration. Soon afterward the Chief Judge lectures on the lessons to be learned from the trial. Questions from the floor do not spare his own feelings if he has shown partiality.

Examinations complete each term, being given orally by the Professor. Candidates are called singly, given two written questions to be prepared in the room, and then questioned extensively in connection with their prepared answer.

Optional lectures on literature, music and art form part of the general cultural campaign being waged within the Soviet Union. First year students may hear lectures on organization of work and study time, and all students may call on the professors at fixed hours for private consultation.

The future task of the Law Institutes is stated concretely by A. Y. Vishinsky, State Prosecutor for the U. S. S. R., who writes, "We must demand that our judges be people with sufficient vital and political preparation. We must set as our task the preparation of our judges in this very direction. There cannot be good courts without good judges."[7]

Art. 99. With the fall of 1937 two Law Schools were opened at Stalingrad and Novorossiisk. Their classification places them on a lower plane than the Law Institutes.

4. Law of Dec. 29, 1935, *Collection of Laws, U. S. S. R.*, 1936, I, No. 1, Art. 2.

5. Law of June 23, 1936, *Collection of Laws, U. S. S. R.*, 1936, I, No. 34, Art. 308.

6. XXIV Lenin, *Sochineniya* (2nd or 3rd ed., Moscow, 1923-35) 364.

7. The Problem of Evaluating Evidence in Soviet Criminal Procedure, *Sotsialisticheskaya Zakonnost*, 1936, No. 7, p. 21 at 26.

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JOSEPH R. TAYLOR
MANAGING EDITOR
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UNIFORM FEDERAL PROCEDURE

The "Federal Rules of Civil Procedure" were adopted by order of the Supreme Court of the United States December 20, 1937.

In compliance with the terms of that order the Attorney General reported the rules to Congress January 3, 1938, the opening day of the second regular session of the Seventy-Fifth Congress.

Section one of the Act of June 19, 1934, restored to the Court its ancient power to prescribe the methods of procedure in actions at law, the exercise of that power having been suspended by the various "Conformity Acts."

Section two of that Act also gave to the Supreme Court the power to "unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both."

The "united rules" have accomplished that result without impairing any right or remedy heretofore available on either side of the court. No equitable doctrine has been restricted. No equitable remedy has been taken away or made less effective.

A similar procedural union has already been attained in more than thirty of the states but not all those states have worked out a single procedure for law and equity in the brief and simple method here employed. These rules now offer a single and uniform method of procedure, free from arbitrary and artificial distinctions which have long been productive of delay, uncertainty and expense.

The great change which the new rules will make is the substitution of a simple, uniform system in all the Federal courts, alike in every state of the Union, in place of the "Conformity Act" so-called; a system which attempted to require in the Federal courts, conformity "as nearly as may be" with the fluctuating procedural statutes of the various states in which the Federal court is held. The failure of the conformity experiment is so well known and has been so often disclosed that it is not necessary here to go into details of its failure.

The new uniform rules are a first step towards a real and workable conformity. They are a composite of the best features of state practice. In at least thirty states the local practitioner can conduct litigation in the Federal courts under those rules without finding many substantial departures from the methods to which he is accustomed in the courts of his own state.

If closer conformity is thought desirable, it is attainable at will by the states. Power can be given by the State legislative bodies to the courts to prescribe the procedure to be followed in their courts. This power has already been given to the Supreme Courts in many States; among them Alabama, Arizona, Colorado, Delaware, Michigan, New Jersey, New Mexico, North Dakota, Pennsylvania, South Dakota, Washington, West Virginia, Wisconsin and (in part) California, Illinois, Kansas and New York.

In the exercise of that power, the courts, with the aid of the bar, can assimilate the state practice to the methods employed in the Federal courts so as to secure any desired degree of conformity, and may make special provisions to meet special conditions where it may be thought that modifications of the Federal procedure are desirable.

In one respect the method of the working out of this new Federal Civil Procedure is worthy of special mention. Suggestions of the bench and bar were invited before the work of drafting began; the 1936 and 1937 drafts of proposed rules were submitted to the bench and bar by direction of the Supreme Court, for criticism and suggestion. Thousands of members of the bar, through committees or individually, responded to this invitation and cooperated in this task. The drafts were discussed and voted on in the 1936 and 1937 meetings of the American Bar Association, which for many years led the fight for the adoption of uniform rules of civil procedure in the Federal Courts.

It is believed that a precedent has been established for a new and better way to formulate and regulate court procedure—a method in which all who desire may find an opportunity to participate instead of one in which methods of procedure are prescribed by a few upon the unheard many whom they will affect.

MR. JUSTICE SUTHERLAND RETIRES

Mr. Justice George Sutherland has availed himself of the privilege of retirement from the office of Associate Justice of the Supreme Court of the United States after more than fifteen years of continuous service on that high tribunal. He took his seat on the 2nd of October, 1922, and his retirement was effective January 8, 1938.

No more competent and authoritative appraisal of his personal qualities and his judicial service could be written than appears in the letter written to him by the Chief Justice and Associate Justices immediately after his retirement was announced. That letter and Mr. Justice Sutherland's reply are as follows:

January 6, 1938.

My dear Justice Sutherland:

Upon your retirement from regular active service on the bench, we wish to give you renewed assurance of our warm affection and of our high appreciation of the distinguished ability and unremitting devotion which have characterized your long participation in the work of the Court. Not only have you brought to our deliberations learning and dialectical skill, a wide knowledge of affairs enriched by varied and eminent public service, and a habit of thoroughness and precision, but you have matched tenacity of purpose with an unvarying kindliness and have mellowed our deliberations with unfailing humor. We keenly regret the loss of this companionship which will ever remain a delightful memory. We trust that in your retirement from the constant labor of active service you will find fresh vigor and the abiding satisfaction which comes from the consciousness of arduous duties performed with complete fidelity.

Faithfully yours,
CHARLES E. HUGHES
J. C. MCREYNOLDS
LOUIS D. BRANDEIS
PIERCE BUTLER
HARLAN F. STONE
OWEN J. ROBERTS
BENJAMIN N. CARDOZO
HUGO L. BLACK.

Mr. Justice Sutherland.

January 7, 1938.

My dear Brethren:

I have read your letter, and make my reply to it with mingled emotions of gratitude for the more than generous things you say, and sorrow that these amenities end the completeness of that close and affectionate comradeship which reaches back so many years. It is very hard for me to step out of this circle, where I have taken comfort for so long. I leave the Court with keen regret. I have loved the work in which we have been engaged together; and only a definite conviction that the time has come reconciles me to the unwelcome thought of laying it down. The memory of our association will remain; but this, although very dear, will not compensate me for the loss of the reality. May health and happiness attend you all throughout the coming years.

Very sincerely yours,
GEO. SUTHERLAND.

THE CHIEF JUSTICE
MR. JUSTICE MCREYNOLDS
MR. JUSTICE BRANDEIS
MR. JUSTICE BUTLER
MR. JUSTICE STONE
MR. JUSTICE ROBERTS
MR. JUSTICE CARDOZO
MR. JUSTICE BLACK

Although born in England, he came to America and to Utah in boyhood, and his professional and public career was identified with the West. He was the thirty-ninth president of the American Bar Association, and his service in the Senate of the United States won for him renown as one of the foremost lawyers in that body. After his appointment to the Supreme Court his precise mind and instinct for justice made their impress on the work of the court. The prime significance and great usefulness of his many contributions to American jurisprudence will be found in opinions dealing with the right of trial by jury, the preservation of that institution as at common law, freedom of the press, liberty of the individual, and the like.

In behalf of the Bar of America, the JOURNAL expresses to the retired Associate Justice the most earnest hopes for his good health, full enjoyment of useful leisure, and the availability of his experience and counsel in the administration of justice, for many years to come.

MR. JUSTICE REED

The lawyers of the United States have welcomed heartily the elevation of Solicitor-General Stanley Reed to membership in the great Court before which he has been so conspicuous, fair, and effective an advocate of the contentions of his client—the government of the United States. During his three years of arduous service in an office that has been graced by lawyers such as Taft, Davis, Beck, Mitchell and Thacher, he has maintained a high reputation for concise presentation, unobtrusive scholarship, capacity for sustained work, and a disarming fairness that won unfailing respect. Over-statement and intolerance of others' views were not in his arsenal of weapons, no matter how momentous the issues; and he commanded and kept the high regard and the cordial friendship of men who disagreed deeply with many of the views which he supported. He left no impression that he had sacrificed the integrity of his judgment or surrendered the independence of his own abiding faith in the law.

By training, experience, and habits of mind, he is well equipped for the work of the Court. Members of the American Bar Association who hail his promotion will miss him greatly from their councils. Lawyers who had held high office in the American Bar Association have become members of the Supreme Court, but none has gone so directly from active work in the Association. At the Boston meet-

ing in 1936, Mr. Reed was one of the most indefatigable members of the Resolutions Committee, and was appointed to that Committee again this year. During 1935-36, he was also a member of the Standing Committee on Jurisprudence and Law Reform. Upon the creation of the House of Delegates in 1936, he became a member *ex officio* as Solicitor-General, attended the 1936 and 1937 meetings of the House, and took keen interest in its work. Aside from the President of the Association at the time in office, probably no other member has been as eagerly sought as a speaker before State and local Bar Associations during the past three years; and Mr. Reed accepted these invitations to the full extent permitted by his official duties.

From those and other relationships the new Associate Justice has come to know the lawyers of the United States to an unusual extent, and they have come to count him among the most kindly and friendly and capable men in their ranks—one whom the President of the United States has done well to appoint to the highest Court.

In responding for the members of the American Bar Association to the addresses of welcome at the Boston meeting in 1936, the Solicitor-General said that "there is no better time than in this good year that the American Bar Association should return to these beginnings of American freedom and American self-government." He pointed out the greater homogeneity of the people and the problems of the United States, and said that "the legislator as well as the counsel deals no longer entirely with individual controversies, with individual instances of disagreement, with single prosecutions or with unit claims," with the result that all forms and procedures, as well as substantive concepts, in the law, "must be worked out by the lawyer as though they were, as in fact they are, a million sources of litigation, so that we may approach our business dealings with bases which cannot be questioned when individual instances arise." In the sessions and work of the Association as he viewed it, "we are fortunate to be able to examine the bases of our law from the point of view not only of research and of history, but from judicial experience as well." A lawyer actuated by such a point of view during his days at the counsel table is indeed likely to be sure-footed as a jurist.

ESSENTIALS OF IMPARTIALITY

IN THE development of standards for the fair and impartial determination of controversies between government and its citizens, by and before judicial and quasi-judicial tribunals, reference could hardly be made too often to the classic Report on Ministers' Powers submitted by the Lord Chancellor to the British Parliament in April of 1932:

"The first and most fundamental principle of natural justice is that a man may not be a judge in his own case. It is on this ground that a decision of a bench magistrate may be quashed by the King's Bench Division of the High Court of Justice in the exercise of its supervisory jurisdiction, on the ground of bias, if a single magistrate on the bench had any interest in the question." (Page 76.)

"But disqualifying interest is not confined to pecuniary interest. In Reg. v. Rand (1866) L. R. I. Q. B. 230, the Court Queen's Bench laid it down that wherever there was a real likelihood that the judge would from kindred or any other cause, have a bias in favor of one of the parties, it would be very wrong in him to act." (Page 77)

"Indeed we think it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest. No honest man acting in a judicial capacity allows himself to be influenced by pecuniary interest; if anything, the danger is likely to be that through fear of yielding to motives of self-interest he may unconsciously do an injustice to the party with which his pecuniary interest may appear to others to identify him. But the bias to which a public-spirited man is subjected if he adjudicates in any case in which he is interested on public grounds is more subtle and less easy for him to detect and resist.

"We are here considering questions of public policy and from the public point of view, it is important to remember that the principle underlying all the decisions in regard to disqualification by reason of bias is that the mind of the judge ought to be free to decide on purely judicial grounds and should not be directly or indirectly influenced by, or exposed to the influences of, either motives of self-interest or opinions about policy or any other considerations not relevant to the issue.

"We are of opinion that in considering the assignment of judicial functions to Ministers, Parliament should keep clearly in vew the maxim that no man is to be judge in a cause in which he has an interest. We think that in any case in which the Minister's Department would naturally approach the issues to be determined with a desire that the decision should go one way rather than another, the Minister should be regarded as having an interest in the case. Parliament would do well in such a case to provide that the Minister himself should not be the judge, but that the case should be decided by an independent tribunal." (Page 78.)

During a period in which the black patches denoting rigid control of the individual by government have loomed ever larger on the map of the World, the American Bar Association, through its Committee on Administrative Law and other instrumentalities, has insistently urged that these essential principles of free government shall be made and kept a part of the law of this land. The need for their observance increases as administrative agencies multiply and their desire to escape or limit review by free Courts is intensified.

REVIEW OF RECENT SUPREME COURT DECISIONS

Power Company Operating under Non-Exclusive Franchise without Standing to Challenge Constitutional Validity of Government Loan and Grant Agreement Covering Financing of Municipal Electric Plant—General Coverage Clause in Maritime Insurance Policy, Insuring against Perils of the Sea, Held to Cover Loss by Stranding—Pennsylvania Tax on Shares Owned in Trust Company Validly Applicable to Shares Held by Non-Resident as Well as Resident Stockholder—Process Patent Held Not to Extend Monopoly to Unpatented Materials—Claims under Certain Patent Held Invalid on Ground Device Did not Represent Invention but Rather the Mere Exercise of Skill of the Calling and Was One Plainly Indicated by Prior Art—Where Amendment to Claim for Refund of Income Tax Is not Permissible—Limitation of Review of Suit to Set Aside Public Utility Commission Order, etc.

By Edgar Bronson Tolman*

National Industrial Recovery Act—Title II—Public Works Program—Standing to Challenge Loan Agreement

A power company, operating under a non-exclusive franchise, has no standing to challenge, on grounds of constitutional invalidity, the execution of a loan and grant agreement by the Federal Emergency Administrator of Public Works, providing for the financing of a municipal electric plant by loan and grant. Since the power company has no legal right giving it immunity from municipal competition, any financial injury which it may suffer by reason of such competition is damnum absque injuria.

Alabama Power Co. vs. Ickes et al., 82 Adv. Op. 263; 58 Sup. Ct. Rep. 300.

In this opinion the Supreme Court considered suits in equity for an injunction brought to test the constitutional validity of Title II of the National Industrial Recovery Act as continued by the Emergency Relief Appropriation Act of 1935. Title II of the Act provides for the preparation and financing of a comprehensive program of public works, and is not to be confused with Title I of the Recovery Act which was declared unconstitutional in *Schechter Corp. v. United States*, 295 U. S. 495. Title II directs the Administrator of Public Works, at the President's direction, to prepare a comprehensive program of public works including projects for the transmission of electrical energy. The Act further provides that loans and grants may be made, among others, to municipalities, the grant in such cases being originally limited to 30% of the cost of labor and materials. The maximum grant was later increased to 45% of such costs.

The bills of complaint sought to enjoin the Administrator from executing loan and grant agreements with four municipalities of Alabama. The agreements contemplated the construction of electrical energy distribution systems and the purchase by the Administrator of bonds, secured by a first pledge of revenues from the systems. The complainant challenged the validity of the loans and grants as unconstitutional and also as not within the statutory provisions. It alleged that it was engaged in the business of distributing electrical energy in the respective municipalities, and alleged that it would suffer a loss of business as a result of the loans and grants enabling the municipalities to set up and maintain rival and competing plants. The suits in question were brought in the United States District Court in the District of Columbia. The respondents maintained the validity of the acts of the Administrator and further contended that the petitioners were without legal standing to maintain the suits. The District Court, after full hearing, ruled that the petitioner had legal standing to challenge the Administrator's action but denied the injunction and dismissed the bills, upon the view that the statutory provisions were constitutionally valid. The Court of Appeals for the District found it unnecessary to consider the validity of the loans and grants, and affirmed the decrees of the District Court dismissing the bills, on the ground that no legal or equitable right of the power company had been invaded and, consequently, that it was without standing to challenge the validity of the Administrator's acts.

On certiorari, the decrees of the Court of Appeals were affirmed by the Supreme Court in an opinion by Mr. Justice Sutherland. He expressed the Court's agreement with a view that the petitioner was without standing to challenge the validity of the Administrator's acts.

Elaborate findings of the trial court were summarized in Mr. Justice Sutherland's opinion. These findings may be further condensed here. It appeared that the petitioner was an Alabama corporation, possessed of a non-exclusive franchise to manufacture and sell electrical energy in that State. Among communities served by its system are the four municipalities involved in the cases under review. The power company is a taxpayer of each of the municipalities, of the State, and of the United States. Each municipality is authorized to construct and operate municipal power distribution systems to compete with the power company and to issue bonds to finance such operations, as well as to receive grants for that purpose. In each municipality ,a majority of the qualified voters approved the project before the loan agreements were made. There was no coercion on the part of the defendants and no conspiracy to cause injury

*Assisted by James L. Homire and Leland L. Tolman.

or financial loss to the power company, or to regulate its rates or to foster municipal ownership of utilities. The expenditures involved no purchase of or contract providing for regulation by the United States. The federal authorities reserved no right to control the rates charged by the municipal plants, or to control the operation of the plants when completed. Each project was a part of a program of national scope designed to relieve unemployment and to promote the general welfare of the United States.

After reciting the findings, MR. JUSTICE SUTHERLAND summarized the petitioner's contention as follows:

"In short, the case for petitioner comes down to the contention that consummation of the loan-and-grant agreements should be enjoined on the sole and detached ground that the administrator lacks constitutional and statutory authority to make them, and that the resulting moneys, which the municipalities have clear authority to take, will be used by the municipalities in lawful, albeit destructive, competition with petitioner."

In dealing with the petitioner's contention, the Court first pointed out that, under *Massachusetts v. Mellon, 262* U. S. 447, 486, the interest of the taxpayer in moneys in the Federal treasury furnishes no basis for equitable relief against the expenditures of such moneys.

After a brief discussion of this phase of the case, the Court turned its attention to a consideration of the question as to what enforcible legal right of the petitioner was invaded or threatened by the alleged wrongful agreements. In pursuing this inquiry, the Court emphasized that there was no element of conspiracy, fraud, malice or coercion involved, and said:

"If conspiracy or fraud or malice or coercion were involved a different case would be presented, but in their absence, plainly enough, the *mere* consummation of the loans and grants will not constitute an actionable wrong. Nor will the subsequent application by the municipalities of the moneys derived therefrom give rise to an actionable wrong, since such application, being lawful, will invade no legal right of petitioner. The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of *damnum absque injuria*. Stated in other words, these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition from which no legal wrong results.

The petitioner's vital contention was resolved into one based on anticipated damage to a right it did not possess, namely, the right to be immune from lawful municipal competition. An analysis of this contention was made in the following portion of the opinion:

"The ultimate question which, therefore, emerges is one of great breadth. Can anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan? An affirmative answer would produce novel and startling results. And that question suggests another: Should the loan be consummated, may such a one sue for damages? If so, upon what ground may he sue either the person making the loan or the person receiving it? Considered apart, the lender owes the sufferer no enforcible duty to refrain from making the unauthorized loan; and the borrower owes him no obligation to refrain from using the proceeds in any lawful way the borrower may choose. If such a suit can be maintained, similar suits by innumerable persons are likewise admissible to determine whether money is being loaned without lawful authority for uses which, although hurtful to the complainants, are perfectly lawful. The supposition opens a vista of litigation hitherto unrevealed.

"John Doe, let us suppose, is engaged in operating a grocery store. Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires*. The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted.

"If there are conditions under which two distinct transactions, neither of which, apart, constitutes a judicially remediable wrong, may be so related to one another as to afford a basis for judicial relief, such conditions are not to be found in the circumstances of the present case."

In support of the view that no legal right of the petitioner was threatened with injury, MR. JUSTICE SUTHERLAND placed great weight upon *Railroad Company v. Ellerman,* 105 U. S. 166. After commenting on the distinguishing features of the cases relied on by the power company, the Court concluded its opinion by pointing out that many of those cases involved the presence of fraud, coercion, conspiracy, or some other controlling element, not found to be present here.

MR. JUSTICE BLACK concurred in the result.

The case of *Duke Power Company and Southern Public Utilities Company v. Greenwood County, et al.,* was also considered and disposed of by MR. JUSTICE SUTHERLAND on the authority of the Alabama Power Company case, and the decree of the Circuit Court of Appeals was affirmed. In this case also, MR. JUSTICE BLACK concurred in the result.

The Alabama Power Co. case was argued by Mr. William H. Thompson for petitioner and by Mr. Jerome N. Frank and the Solicitor General for respondents.

The Duke Power Co. case 82 Adv. Op. 270; 58 Sup. Ct. Rep. 306, was argued by Mr. W. S. O'B. Robinson, Jr. for petitioner, by Messrs W. H. Micholson and D. W. Robinson, Jr. for respondent, Greenwood County, and by Mr. Jerome N. Frank for respondent Harold L. Ickes, et. al.

Public Utilities—Rate Making—Valuation

In review of a suit to set aside an order of a public utility commission fixing the rates to be charged for gas, where the evidence before the commission and the lower court are not before the Supreme Court, the latter will confine its review to questions of procedural due process.

In such circumstances, the rate order will not be set aside as arbitrary on its face, where it appears that the commission received evidence of value offered by the utility, and heard its arguments in a fair hearing, even though it appears that the commission gave controlling weight to evidence of historical cost of the properties involved.

Railroad Comm. of Cal. v. Pacific Gas and Electric Co., 82 Adv. Op. 327; 58 Sup. Ct. Rep. 334.

In this case, the Supreme Court reviewed an appeal from an order of a District Court composed of three judges, which had permanently enjoined an order

of the Railroad Commission of California. The Commission by order had fixed rates for gas supplied by the appellee company. The latter had challenged the order as a deprivation of its property without due process of law, contrary to the Fourteenth Amendment. A hearing was held before a special master, who, on the basis of findings as to value, expenses and revenues, concluded that the rates were confiscatory and void. The District Court stated that it did not pass upon and did not approve or reject the master's findings as to fair value or determine the net income which the challenged rates would produce, and that it did not determine what would be a fair rate of return, but rested its decision solely upon the denial of due process of law by the Commission in fixing the rates. A prior appeal to the Supreme Court resulted in affirmance by an equally divided bench. The present opinion, delivered by the CHIEF JUSTICE, was rendered after reargument of the case.

In dealing with the case, it was noted first that the evidence taken before the Commission and before the District Court was not brought before the Supreme Court, except for certain affidavits of the president of the company and the president of the Commission. The company, in effect, challenged the action of the Commission as invalid upon the face of its opinion and order. In rejecting the soundness of this position, MR. CHIEF JUSTICE HUGHES observed that there appeared to be no basis for the contention that the order was entered in violation of state law. He then turned to consideration of the constitutional question. In approaching this question, he pointed out that the District Court did not deal with the issue of confiscation and, since the evidence was not before the Supreme Court, it was concerned only with the question of procedural due process rather than with the effect of the order on the company's property rights. To determine the soundness of the appellee's contention that it had been denied due process, the Court briefly reviewed the rulings governing the proceedings of rate making commissions, and said:

"The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. . . There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily. . . As we have seen, the respondent was heard. the Commission received the testimony of respondent's witnesses, its exhibits and arguments. There is nothing whatever to show that the hearing was not conducted fairly.

"The complaint is not of the absence of these rudiments of fair play but of the method by which the Commission arrived at its result. As to this a fundamental distinction must be observed. While a fair and open hearing must be accorded as an inexorable safeguard, we do not sit as an appellate board of revision but to enforce constitutional rights. . . When the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily, the requirements of procedural due process are met. and the question that remains for this Court, or a lower federal court, is not as to the mere correctness of the method and reasoning adopted by the regulating agency but whether the rates it fixes will result in confiscation."

Attention was then given to the respondent's contention that the Commission had refused to consider the fair value of the company's property, but had, in fixing the rate basis, given effect solely to historical cost. In support of this contention the company pointed to certain statements in the Commission's findings in which it discussed the reasons why historical method had dominated its findings. These statements, however, were found insufficient to warrant the conclusion that the Commission had refused to give consideration to cost of reproduction and other evidence. The comments of the CHIEF JUSTICE on this aspect of the case were, in part, as follows:

"But it does not follow from these statements that the Commission refused to receive evidence of the cost of reproduction or to consider that or other evidence presented by respondent with respect to the value of its property. The contrary clearly appears.

"Respondent submitted to the District Court affidavits of its president setting forth its contention that no consideration was given to reproduction cost. This contention was combatted by an affidavit of the president of the Commission in which it is stated that the Commission gave careful consideration to all the testimony of record relative to value and to the testimony offered by respondent respecting reproduction cost. These affidavits are of slight value as we have the official opinion of the Commission stating the course which it pursued. That opinion shows precisely what the Commission has done in this instance. The Commission states, 39 *Id.* p. 64:

" 'Testimony regarding the cost to reproduce the properties here under consideration was presented by the company's valuation engineer on several price bases, all being developed through the application of price translation factors, and not through the application of appropriate prices to an inventory of the property. In each pricing period offered the estimate to reproduce was higher than the historical cost. For the first six month's period of 1933 the reproduction cost was shown as 8 per cent higher than historical. A perusal of price trend charts introduced by the company elsewhere in the proceedings indicate that the estimate must be in error. It is not conceivable that a property, 80 per cent of which has been constructed in the high price period following 1919, could not be reproduced for a lesser cost under prices prevailing in the first six months of 1933. Witness for the city of San Francisco clearly indicated why the estimate was erroneous when he showed that the method used ignored certain factors tending in later years to decrease cost, such as improvement in construction materials and methods, increased use of mechanical equipment and a lessening in the width of the excavations and pavement cut. The estimates of cost to reproduce are not at all convincing and cannot be of positive value in this proceeding.'

"The Commission was entitled to weigh the evidence introduced, whether relating to reproduction cost or to other matters. The Commission was entitled to determine the probative force of respondent's estimates. That the Commission did so is apparent from both its statement to that effect and the reasons it gives for considering these estimates to be without positive value. The Commission compared them with other evidence and found the estimates to be erroneous. It found that 80 per cent of the property had been constructed in the prior 'high priced period' and the Commission thought it inconceivable that the property could not be reproduced 'for a lesser cost under prices prevailing in the first six months of 1933.' These statements not only do not suggest but definitely rebut an inference of arbitrary action.

"There is no principle of due process which requires the rate making body to base its decision as to value, or anything else, upon conjectural and unsatisfactory estimates. We have had frequent occasion to reject such estimates."

The Court was also of the opinion that there was no support for the contention that the order was entered without evidence and was, therefore, arbitrary.

since it is the established rule that historical cost itself is admissible evidence of value.

The Court concluded that since the main issue in the litigation was whether the rates as fixed were confiscatory and since the District Court had not determined that issue, the decree should be reversed and remanded for further proceedings.

MR. JUSTICE BLACK concurred in the reversal of the decree.

MR. JUSTICE SUTHERLAND took no part in the consideration of the case.

MR. JUSTICE BUTLER delivered a dissenting opinion in which MR. JUSTICE MCREYNOLDS concurred.

In the dissenting opinion, MR. JUSTICE BUTLER discussed the applicable principles of valuation in some detail, and emphasized particularly that in his judgment the Commission had refused to consider present value as compared with original cost of construction and that this was contrary to the principles laid down by the Court in its prior decisions, and that, consequently, the decree of the District Court should be affirmed. The substance of MR. JUSTICE BUTLER'S view of the case is indicated by the following comment on the action of the Commission:

"The commission was bound by our decisions to ascertain and consider present cost as compared with original cost of construction. It refused to do so. The method it followed conflicts with fundamental principles established here in that it condemned the company's existing rates as excessive and prescribed lower ones without any basis of fact to warrant that action. When the State, acting through the commission, set aside existing rates and ordered lower ones for the future, it exerted power to take, or to compel use of, private property for service of the public. Due process required just compensation—rates sufficient to yield a reasonable rate of return on the value of the property used to furnish the gas. Without a finding of value it is impossible to ascertain the required amount. To take mere cost of physical elements, instead of total value, and to deduct development expenses from revenue instead of including in value the amount found properly attributable to intangible elements and going value, and then, because of that error, to fix a rate of return on historical cost greater than would be required on value, is to leave the order without known or discoverable foundation. It is to make individual views as to what is just serve in place of the definite principles. The formula followed by the commission prevents consideration of present value or of the estimated present cost, in comparison with the original: i. e., the historical cost of the property. The commission gave no weight to the company's evidence of present cost of construction. It made no investigation to ascertain, did not attempt to find and would not use, present cost or present value. It seems to me very clear that, save merely to reject it as inadmissible, the commission refused to pay any attention to the company's evidence of reproduction cost.

"The commission having failed to find value, our decisions required the district court to enter the decree appealed from.

* *

"I cannot refrain from protesting against the Court's refusal to deal with the case disclosed by the record and reasonably to adhere to principles that have been settled. Our decisions ought to be sufficiently definite and permanent to enable counsel usefully to advise clients. Generally speaking, at least, our decisions of yesterday ought to be the law of today."

The case was argued by Mr. Ira H. Rowell for appellants, by Mr. Warren Olney, Jr., for appellee, and by Mr. Oswald Ryan for the Federal Power Commission as amicus curiae, by special leave of Court.

Taxation—Income Tax—Amendment of Claim for Refund

An amendment to a claim for refund of an income tax is not permissible after the expiration of the time for filing a claim for refund, where the amendment seeks a refund on account of items different from and unrelated to the items contained in the original claim.

United States v. Andrews, 82 Adv. Op. 282; 58 Sup. Ct. Rep. 315.

This case involved a determination as to whether a claim for income tax refund asking repayment for a specific sum, on a specific ground, is susceptible of untimely amendment to recover a greater sum on a new and unrelated ground. The respondent, as administratrix, paid the income tax due under her return, which showed an item of gross income of $110,891 as "dividends from domestic corporations." Of this total $36,750 was erroneously reported as dividends from the M. A. Hanna Company, which was paid under a recapitalization of the company in which the estate held preferred stock. Instead of being treated as a dividend, the amount should have been treated as creating a capital gain of $7,411.50.

In December, 1931, an Internal Revenue agent advised the respondent that her return was considered correct, subject to approval of the Bureau in Washington, and that if later information should indicate a material change in the tax, the statute would require a redetermination of liability. On October 6, 1932, after conference with the Hanna Company, the Commissioner advised the Cleveland Agent that the cash received by preferred stockholders upon the recapitalization constituted proceeds from a sale and that gain or loss therefrom should be determined upon the stock's original cost. The respondent was not notified of this ruling until August 22, 1934. On February 1, 1933, respondent filed a claim for refund of $995.52, based on an alleged loss in the taxable year on account of the worthlessness of the stocks of two corporations. Action was delayed on this claim pending the outcome of pertinent litigation, but in 1936 the claim was rejected except as to $160. In June, 1934, after the statutory period for filing refund claims had expired the respondent made a claim for $6,454.09, stating that it was filed as an amendment and in amplification of the claim for refund filed February 1, 1933, and asserting that the sum of $36,750 reported as a dividend was properly proceeds of sale of stock of the Hanna Company at a profit of $7,411.50, and that the error produced an overpayment of $6,454.09.

In November, 1935, the Commissioner advised the respondent that although an overpayment had been made, a refund would be denied because the claim of June, 1934, was wholly unrelated to that of February 1, 1933. Official notice of rejection was given on December 16, 1935. The respondent sued in the Court of Claims which gave judgment for her in the sum of $5,536.97. On certiorari, this judgment was reversed by the Supreme Court in an opinion by MR. JUSTICE ROBERTS.

After referring to the cases relied upon by the parties and concluding that none of them ruled the precise question involved, MR. JUSTICE ROBERTS proceeded to the following statement of the controlling principle:

"In all these cases the court found the analogies of pleading helpful in deciding whether the claim was in such form as to be subject to the proffered amendment at a time when a claim wholly new would have been barred; but the opinions point out that the analogy to pleading at

law is not to be so slavishly followed as to ignore the necessities and realities of administrative procedure. Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim."

A discussion of the facts then followed, leading to the conclusion that the amendment sought a refund on account of items different from and unrelated to the items contained in the original claim, and resulting in a reversal of the judgment of the Court of Claims.

United States v. Garbutt Oil Co., involved a question similar to that considered in *United States v. Andrews*. An additional contention urged by the taxpayer and considered by the Court was that the Commissioner had waived objection to the amended claim by considering its merits. But this view was rejected on the ground that the Commissioner had no power to waive the limitation. MR. JUSTICE ROBERTS, who delivered the opinion here also, said in part:

"The respondent urges that although the amendment was not timely, the Commissioner, in considering the merits of the position taken therein, waived any objection which might have been available to him that this position was not disclosed in the original claim. The contention is bottomed upon the fact that, in his letter of August 12, 1929, the Commissioner refers to the reasons advanced in the untimely statement. The argument confuses the power of the Commissioner to disregard a statutory mandate with his undoubted power to waive the requirements of the Treasury regulations. The distinction was pointed out in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71, wherein it was said: 'The line of division must be kept a sharp one between the function of a statute requiring the presence of a claim within a given period of time, and the function of a regulation making provision as to form. The function of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research.' In the cited case, and others decided at about the same time, we held that, while the Commissioner might have enforced the regulation and rejected a claim for failure to comply with it in omitting to state with particularity the grounds on which the claim was based, he was not bound to do so, but might waive the requirement of the regulation and consider a general claim on its merits. This was far from holding that after the period set by the statute for the filing of claims he had power to accept and act upon claims that complied with or violated his regulations."

The Andrews case was argued by Mr. Norman D. Keller for the petitioner, and by Mr. Fred R. Seibert for the respondent.

The Garbutt Oil Co. case (82 Adv. Op. 288; 58 Sup. Ct. Rep. 320) was argued by Mr. Norman D. Keller for petitioner and Mr. L. A. Luce for respondent.

Banks and Trust Companies—Taxation of Shares of Resident and Non-Resident Stockholders Held in Trust Company

The Pennsylvania tax on shares held in a trust company is construed to be a tax on the shares themselves rather than on the assets of the trust company. As such, it is validly applicable to shares held by a non-resident as well as a resident stockholder, even though the ownership of the stock of the non-resident stockholder may also be taxable in another state.

Schuylkill Trust Co., v. Pennsylvania, 82 Adv. Op. 291; 58 Sup. Ct. Rep. 295.

This case is a sequel to *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113. There the Court held invalid a Pennsylvania taxing act on the ground that, as construed and applied, it discriminated against federal securities and national bank shares, held by trust companies subject to the act, by failing to allow certain deductions in respect of them which were allowed on account of securities held by the trust companies in certain specified Pennsylvania corporations. The legislation there held invalid was amendatory to a basic act of 1907.

When the case was remanded, the State courts, over protest of the appellant, proceeded to redetermine the tax on the basis of the basic act, diregarding the amendatory legislation condemned as unconstitutional. This action the appellant challenged as being in disregard of the mandate of the Supreme Court.

But the latter, in an opinion by MR. JUSTICE ROBERTS, sustained the ruling of the State Supreme Court saying:

"When the case was previously heard we held the statute invalid as construed and applied and remanded the cause for further proceedings not inconsistent with our opinion. It is clear that the State courts were not precluded from construing the statute so as to eliminate the unconstitutional features. It follows that the appellant was not entitled, as a matter of right, to a general judgment in its favor exempting it from all tax."

The Federal Supreme Court ruled also that it was not open to it to pass on the question whether the State courts had acted in violation of the State constitution in "amending" the taxing act rather than "construing" it.

On the former appeal, the Supreme Court found it unnecessary to decide whether the tax was upon the shares as such or upon the capital, surplus and profits of the company. But in the instant case, decision of that question was found necessary, and it was decided that the tax was imposed on the shares themselves. As to this MR. JUSTICE ROBERTS said:

"The statute on its face lays the tax upon the property of the stockholder, represented by the shares he owns. The state courts, and the local federal court, have held the imposition a tax upon the shares. The history of legislation respecting taxation of banks and trust companies in Pennsylvania leads to the same conclusion. We are of opinion that the tax is one upon the shares as such and not upon the assets of the company."

A final point discussed in the opinion was in relation to the ruling of the State Court that non-resident shareholders are within the scope of the statute. The appellant argued that this construction was in violation of the equal protection and due process clauses of the Fourteenth Amendment, since the taxing power of Pennsylvania is limited to persons and property within her jurisdiction. But the contention was rejected, on the authority of *Cory v. Baltimore*, 196 U. S. 466; and the distinction relied upon by the appellant to distinguish that case were thought without controlling significance.

Furthermore, a broad ground in support of applying the tax to non-resident stockholders was stated in the concluding portion of the opinion, as follows:

"Moreover, the shares represent a property interest, an aliquot proportion of the whole corporate assets. The shareholders, whether domestic or foreign, depend for the

preservation and protection of this property upon the law of the state of the corporation's domicile. The property right so represented is of value, arises where the corporation has its home, and is therefore within the taxing jurisdiction of that state; and this, notwithstanding the ownership of the stock may also be a taxable subject in another state."

The case was argued by Mr. John Robert Jones for the appellant, and by Mr. Manuel Kraus for the appellee.

Income Taxes—Credits and Deductions on Account of Taxes Paid or Accrued to a Foreign County

Normal income taxes paid by a British corporation with respect to dividends paid to an American stockholder are not income taxes paid or accrued by the taxpayer within the meaning of § 131 (a) (1) of the Revenue Act of 1928, and hence may not be credited on income taxes due the United States. Neither are such taxes deductible under § 23 (c) (2) in determining net income.

Biddle v. Commissioner of Internal Revenue, 82 Adv. Op. 349; 58 Sup. Ct. Rep. 379.

In this opinion the principal question concerned the effect of Section 131 (a) (1) of the Revenue Act of 1928 in its relation to British standard or normal income taxes imposed with respect to dividends paid to American stockholders, where the British corporations pay the tax to the British government. In their British tax returns the stockholders must report as income, in addition to the amount of dividends actually received, amounts which reflect their proportions of the tax paid by the corporation on its own profits. The provision of Section 131 of the Revenue Act referred to provides that "income . . . taxes paid or accrued during the taxable year to (a) foreign country" may be credited on United States income taxes.

A further question was whether any of the amounts not available as a credit may be deducted from gross income under Section 23 (c) (2) for the purpose of determining the taxable net income.

The Board of Tax Appeals held that the sums in dispute should not have been included in gross income because they represented neither property received by the tax payers nor the discharge of any taxes owed by them to the British government; it also held that Section 131 (a) (1) is inapplicable because Great Britain fails to tax dividends at the normal rate, and that hence the tax appropriate to dividends was paid by the corporation, rather than by the stockholders themselves.

A conflict of decisions having arisen in the Circuit Courts of Appeal as to the correctness of the Board of Tax Appeal's ruling, the Supreme Court granted certiorari to resolve the conflict. In an opinion by MR. JUSTICE STONE, the Court, after a careful examination of the British scheme of taxation, concluded that the taxes paid by the British corporations are not taxes paid or accrued by the taxpayer subject to United States laws, within the meaning of Section 131 (a) (1), and cannot be credited against the tax under the provisions of that section.

In discussing the legal questions, MR. JUSTICE STONE remarked at the outset that the decision must turn on the meaning of the words used in the Revenue Act; that the power to tax and to allow credits rests in Congress; that the expression of its will in legislation must be taken to conform to its own criteria, unless the statute requires that the phrase "paid or accrued" shall depend upon its characterization by foreign statutes and decisions under them.

Concluding that our statutes contain no such requirement, and that the taxes paid by the corporation are not paid or accrued by the taxpayer within the intent of Section 131 (a) (2), MR. JUSTICE STONE said:

"The stockholders' surtax is computed upon the gross dividend, the dividend which he actually receives plus the tax deducted. If the stockholder's income is exempt or less than the minimum amount subject to the tax, refund is made to him of the proportionate share of the tax paid by the corporation. It is upon these features of the British system that the taxpayers chiefly rely to support their argument that the stockholder pays the tax. For these limited purposes, which do not affect the assessment and payment of the tax, it is true that the British acts treat the stockholder as though he were the taxpayer. But with respect to the surtax the stockholder pays it and the taxpayers here have received for its payment the credit which our statute allows. Inclusion of the deducted amount in the base on which surtax is calculated, together with the provisions for refund of the tax to the stockholder who, in any event, bears its economic burden, are logical recognitions of the British conception that the standard tax paid by the corporation is passed on to the stockholders.

"Our revenue laws give no recognition to that conception. Although the tax burden of the corporation is passed on to its stockholders with substantially the same results to them as under the British system, our statutes take no account of that fact in establishing the rights and obligations of taxpayers. Until recently they have not laid a tax, except surtax, on dividends, but they have never treated the stockholder for any purpose as paying the tax collected from the corporation. Nor have they treated as taxpayers those upon whom no legal duty to pay the tax is laid. Measured by these standards our statutes afford no scope for saying that the stockholder of a British corporation pays the tax which is laid upon and collected from the corporation, and no basis for a decision that § 131 extends to such a stockholder a credit for a tax paid by the corporation—a privilege not granted to stockholders in our own corporations. It can hardly be said that a tax paid to the Crown by a British corporation subject to United States income tax is not a tax paid within the meaning of § 23 (c) (2), of the 1928 Act, which allows a deduction from gross income for taxes paid to a foreign country, . . or that its stockholders could take credit under § 131 for their share of the tax on the theory that they also had paid it."

The Court was of the opinion that the ruling on the principal question was controlling as to the question of deductions under Section 23 (c) (2), and that the taxes paid in Great Britain could not be allowed as such deductions. As to this MR. JUSTICE STONE said:

"What we have said is decisive of the second question, whether any of the amounts not available for credit under § 131 may be deducted from gross income for the purpose of arriving at taxable net income. By § 23 (c) (2) of the 1928 Act the deductions of 'income . . . taxes imposed by the authority of any foreign country' are limited to taxes paid or accrued. Since we have held that the taxpayer has not paid or become subject to the foreign tax here in question, the section by its terms is inapplicable."

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER dissented.

The case was argued by Mr. Frank J. Wideman for petitioner in No. 55, by Mr. J. Louis Monarch for petitioner No. 505 and Respondent in No. 55, and by William R. Spofford for respondent in No. 505.

Patents—Invention—Addition Indicated by Prior Art

Claims 1, 3, 14 and 15 of Schletter Patent No. 1,713 628 of 1929 covering an attachment for knitting machines are held invalid on the ground that the addition of a reversing mechanism to elements previously exhibited, for the

purpose of effecting variations in the throw of a secondary yarn carrier, was not an invention, but rather the mere exercise of the skill of the calling, and was one plainly indicated by the prior art.

Textile Machine Works v. Louis Hirsch Textile Machines, Inc., 82 Adv. Op. 297; 58 Sup. Ct. Rep. 291.

In this opinion, by MR. JUSTICE STONE, the Court unanimously affirmed a decree of the Circuit Court of Appeals, 2nd Circuit, holding invalid certain claims under the Schletter Patent No. 1,713,628 for 1929. The patent covers an attachment for "flat" or "straight" knitting machines, including machines of the "full-fashioned" type. By the attachment "yard-guides can be accurately controlled to lay a yarn over a distance of less than the full length of a course being knitted, as for reinforcing or for so-called split-seam work wherein sections of the fabric are connected by suture seams." A characteristic feature of the manufacture is that the garment is shaped by variation in its width so as to conform to the contour of the body to be fitted, when its shaped edges are united in a seam.

In dealing with the case, MR. JUSTICE STONE described in detail certain technical aspects of machine knitting and of the machines used in the process. For a discussion of these features, the reader must be referred to the opinion itself.

The conclusion of the Court, that the device in question was not new invention, was stated as follows in the opinion of MR. JUSTICE STONE:

"The addition of the reversing mechanism, used by Nusbaum and previously used in the full-fashioned machine, to the elements exhibited by the Gotham, for the purpose of effecting variations in the throw of the secondary yarn carrier in precisely the manner in which the throw of the primary yarn carrier had been controlled in full-fashioned machines, was plainly not invention. The addition of a new and useful element to an old combination may be patentable; but the addition must be the result of invention rather than the mere exercise of the skill of the calling, and not one plainly indicated by the prior art. (citing cases). The art of machine design in the knitting machine field is a highly developed one. The addition to the combination of the Gotham attachment of a means for automatically reversing the rotary threaded spindle to perform the very function it had performed in the full-fashioned knitting machine was not beyond the skill of the art and was plainly foreshadowed, if not completely anticipated, by Nusbaum.

* *

"Petitioner relies on the novelty of conception reinforced by an alleged commercial success. Commercial success may be decisive where invention is in doubt, but an insuperable obstacle to the invocation of that doctrine here is our inability, like that of the court below, to say 'than an art which knew how to reinforce "full-fashioned" webs without re-entrant angles, and straight edged webs with such angles, required some uncommon talent merely to conceive of combining the two, for, as we have said, the patent can only stand on the bare conception.'"

The case was argued by Mr. Charles M. Howson for the petitioner, and by Mr. Samuel E. Darby, Jr. for the respondent.

Patent—Process Patent in Relation to Unpatented Materials Used in Process

A process patent does not extend the patent monopoly to unpatented materials, and the holder of the patent has no standing to suppress competition in the sale of unpatented materials to be used in the patented process.

Leitch Mfg. Co., Inc. v. The Barber Co., Inc., 82 Adv. Op. 276; 58 Sup. Ct. Rep. 288.

In this opinion, the Court passed upon a question as to the extent of the right of the owner of a process patent to suppress competition in the sale of unpatented material to be used in the patented process.

The respondent, the Barber Company, is owner of a patent covering the process of retarding the evaporation of bituminous material used in road building. After a summary of the facts, the Court concluded that the patent did not confer upon the Barber Company the right to be free from competition in supplying material to be used in practicing the invention. On this point the decision in *Carbice Corporation v. American Patents Development Corporation*, 283 U. S. 27, was found to be controlling.

Rejecting the respondent's attempt to distinguish the *Carbice* Case, and placing its decision upon the broad ground that a process patent does not extend the patent monopoly to unpatented material used to practice the invention, the Supreme Court, in an opinion by MR. JUSTICE BRANDEIS, reversed the decree of the court below, and said:

"The distinction upon which The Barber Company thus rests is without legal significance. The Court held in the *Carbice* case that the limitation upon the scope or use of the patent which it applied was 'inherent in the patent grant.' It denied relief, not because there was a contract or notice held to be inoperative, but on the broad ground that the owner of the patent monopoly, ignoring the limitation 'inherent in the patent grant,' sought by its method of doing business to extend the monopoly to unpatented material used in practicing the invention. By the rule there declared every use of a patent as a means of obtaining a limited monopoly of unpatented material is prohibited. It applies whether the patent be for a machine, a product, or a process. It applies whatever the nature of the device by which the owner of the patent seeks to effect such unauthorized extension of the monopoly . . ."

MR. JUSTICE CARDOZO took no part in the consideration of the case.

The case was argued by Mr. Samuel Ostrolenk for the petitioner, and by Mr. George J. Harding for the respondent.

Criminal Law—Offenses Against the Currency

Under the provisions of Section 150 of the Criminal Code, making it a crime to have in possession any paper similar to that adopted by the Secretary of the Treasury for obligations and other securities of the United States, it is sufficient to sustain a conviction if shown that the defendant was in possession of any similar paper adapted to the making of such obligation or other security. The crime defined by that section is not limited to possession of paper exactly like that adopted by the Secretary of the Treasury for genuine obligations.

The United States v. Raynor, 82 Adv. Op. 307; 58 Sup. Ct. Rep. 353.

In this case the Court, by a divided bench, affirmed a judgment of conviction for violation of a provision of Section 150 of the Criminal Code. That provision reads as follows:

"Whoever shall have or retain in his control or possession after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than $5,000, or imprisoned not more than fifteen years or both."

The Circuit Court of Appeals had reversed the District Court's judgment of conviction upon the ground that the statute does not prohibit the posses-

sion of any except the distinctive paper adopted by the Treasury, and that other paper was not prohibited although closely resembling the distinctive paper and being well suited for successful counterfeiting. The Circuit Court of Appeals took the position that the evidence did not support a conviction.

It appeared that in 1928 the Treasury adopted a distinctive paper for obligations of the United States; such paper was a high grade rag bond having a sharp rattle, very little gloss and short silk fibers throughout. The respondents in 1936 had possession of a paper of practically the same color, weight, thickness and appearance as the government paper, cut to dimension of $20 government obligations. The respondents' paper rattled like genuine money although it did not have silk fibers throughout. Instead, red and blue marks were so expertly designed on it that one of the Judges in the court below, after careful examination of the marks with a magnifying glass, was wholly uncertain as to whether they were woven in the fabric or traced on the surface.

On certiorari, the majority opinion of the Supreme Court was delivered by MR. JUSTICE BLACK, whose analysis of the act dealt with two phases, namely, the history of the act, and the language of the statute itself.

In dealing with the first branch of the question, MR. JUSTICE BLACK pointed out that, historically, the intent of the Congress had been to strengthen legislation on this topic in order to prevent counterfeiting and that the construction adopted by the court below would run counter to the purpose of Congress as disclosed by the history of the act.

Turning then to the language of the statute, MR. JUSTICE BLACK expressed the opinion that the court below had adopted irreconcilable definitions of the terms of the Act, and said:

"That particular language is the phrase *'similar paper adapted to making such obligations.'* The word 'similar,' and the phrase 'adapted to making such obligations or securities,' both describe the type of paper the possession of which is prohibited. The definitions given by the court below to this word and this phrase are irreconcilable.

"That court defined 'similar' to mean 'somewhat alike'; 'not exacty alike'; 'like, but not exactly the same.' 'Similar paper,' thus defined, cannot be identical with the distinctive paper adopted by the government, because while the two papers would be 'somewhat alike,' they would not be 'exactly alike' or 'exactly the same.' Similarity is not identity, but resemblance between different things. Under this definition, 'similar paper,' the possession of which is prohibited, is not identical with, but differs from the distinctive paper.

"However, after giving this definition to similar paper (which is prohibited by the act), the court below concluded that the phrase 'adapted to making such obligations' limits the prohibition of the act to the distinctive paper. This conclusion is not consistent with the determination that 'similar'—also describing the paper prohibited—designates paper which is different from the distinctive paper. A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress.

"There is no inconsistency in the act unless it is assumed that the word 'obligations' refers to genuine obligations only. Since words that have one meaning in a particular context frequently have a different significance in another, it is necessary to consider the context of the words 'such obligations', in order to determine their significance. The provision of law here construed is the last of seven separate offenses set out in one paragraph of a chapter of the Criminal Code entitled 'Offenses against the Currency.' The provisions of this chapter were enacted to prevent and to punish counterfeiting. Six closely connected companion offenses are set out in the same section with the offense charged against respondents and all either penalize the possession of, or trafficking in, counterfeit obligations or the materials and devices used to make such obligations.

"Examining the context of the words under consideration we find that the word 'obligations' appears throughout the Chapter relating to offenses against the currency, and does not always apply to 'genuine' obligations, but may, and often does refer to 'counterfeit' or 'spurious' obligations."

The true construction of the statute was then described as follows:

"The relative positions of the words we are examining are important. The first word describing the prohibited paper is 'similar.' Unless the paper possessed is 'similar' to the distinctive paper of the government, its possession is not prohibited. Genuine obligations can only be made from the genuine distinctive paper, with a genuine design; with genuine lithographing; and with genuine signatures. Conversely, counterfeit obligations would be the result of designs, lithographing, signatures or paper—not genuine, but merely 'similar' to the genuine. When, therefore, Congress used the words 'similar paper' it included within its prohibition an imitation or counterfeit of the genuine paper. The effect was the same as though it had prohibited possession of a government obligation bearing a signature 'similar' to the signature of the Secretary of the Treasury. After the appearance of the word 'similar,' subsequent words descriptive of the prohibited paper require a construction that will give effect to the Congressional intent to prohibit the possession of paper which is an imitation or counterfeit of that adopted by the government."

MR. JUSTICE SUTHERLAND delivered a dissenting opinion, in which he expressed agreement with the opinion of the court below. In his opinion the construction adopted by the majority was tantamount to amending the statute by changing the words "adapted to the making of such obligations" to read "adapted to the making *of counterfeits* of such obligations." In amplification of this view, MR. JUSTICE SUTHERLAND said, in part:

"The provisions of the statute were not meant to cover counterfeiting, or preparations antecedent to counterfeiting. Their whole purpose was to penalize possession or retention by unauthorized persons of the distinctive kind of paper which the Secretary has adopted for the making of the obligations of the United States; language which, as we have said, necessarily imports genuine obligations, because if not genuine they would not be obligations of the United States at all.

"The government, however, takes the view that the statute extends to the possession of paper suitable, not for making genuine obligations, but for *counterfeiting* them. And this view, as we understand it, is also taken by the court in its present opinion. The difficulty with that view, however, is that it requires the introduction of an amendment so that clause (3), instead of reading 'adapted to the making of such obligations', etc., will read 'adapted to the making of *counterfeits of* such obligations', etc. Such an assumption of legislative power is inadmissible.

"That the paper here in question, even if in the hands of the Treasury, was not adapted to the making of genuine obligations, is beyond dispute. The distinctive feature of the paper adopted by the Secretary is the presence of short, fine red-and-blue silk fibers impregnated in and distributed throughout a high-grade rag bond paper. These silk fibers are entirely absent from the paper here in question; and while it might have been used for counterfeiting government obligations, it was not adapted to making the genuine articles. The present decision brings within the reach of

the statute every stationer who has in his possession for sale any high-grade rag bond paper, if it is capable of being used for counterfeiting government obligations. For the statute, it will be observed, requires no criminal intent, and nothing beyond mere possession or retention."

The case was argued by Mr. Assistant Attorney General McMahon for the petitioner, and by Mr. John Elliott Byrne for the respondents.

Maritime Insurance—General Coverage Clause—Proximate Cause of Loss

A general coverage clause in a maritime insurance policy, insuring against perils of the sea, covers loss caused by stranding. Under such policy, where a ship with perishable cargo is delayed by stranding, and the delay results in a total loss of the perishable cargo, the stranding is the proximate cause of the loss, and the insurer is liable therefor.

Lanasa Fruit Steamship and Importing Co. v. Universal Insurance Co., 82 Adv. Op. 354; 58 Sup. Ct. Rep. 371.

In this opinion, the Court passed upon the scope of a general coverage clause in a policy of marine insurance. The respondent insured petitioner's vessel under a policy, whereby the insurer engaged to insure against perils of the sea and also assumed liability for loss in consequence of delay resulting from certain other causes. The petitioner's vessel was carrying a cargo of bananas; while proceeding up Chesapeake Bay in July, 1935, she became stranded and before she could be refloated the entire cargo of bananas become overripe and rotted, resulting in a total loss.

After considering two preliminary questions, one as to the sufficiency of the declaration, and the other as to the effect of the cancellation of a rider to the policy, the Supreme Court, in an opinion by MR. CHIEF JUSTICE HUGHES, gave consideration to the broad question involved, namely, whether a general coverage clause of a marine cargo insurance policy, insuring for loss caused by perils of the sea, covers a loss where a marine peril, such as stranding, has so delayed the voyage that the cargo has become a total loss. Contending that the clause did not cover the loss in question, the insurer urged (1) that the deterioration of perishable cargo, caused through inherent vice while the vessel is delayed by a sea peril, is not, without more, covered under a marine policy unless the same expressly insures against such deterioration; and (2) that more than mere delay must be shown, and that the adventure was frustrated by reason of the vessel's forced departure from the course of voyage, as, for example, where the vessel has put into a port of distress and remained there for such period that an abandonment or frustration of the voyage has been effected.

Rejecting these contentions, and reversing the judgment, MR. CHIEF JUSTICE HUGHES emphasized the legally controlling facts, as follows:

"In considering these contentions, we start with the fact that the vessel, while proceeding up Chesapeake Bay, stranded. That is alleged and conceded. Stranding is a peril of the sea. . . . Loss through stranding was within the coverage of the policy. This, as the court below observed, was expressly recognized in the warranties against particular average in which loss by stranding was excepted. . . . And it was the stranding which caused the delay. The case is not one of the mere lengthening of a voyage due to the ordinary vicissitudes of wind and wave against which the underwriter does not insure . . . and we are not called upon to determine in what circumstances other than those now presented delay may be considered to be due to a peril of the sea within the meaning of the policy.

"The cargo was perishable fruit. Respondent insists that its decay was caused by inherent vice which began to operate as soon as the fruit was picked. But, although perishable, the cargo was insured for the voyage against sea perils and the sole question is whether a sea peril caused the loss. As we have said, we must assume for the present purpose, in view of the way in which the case was presented and determined below, that the fruit was sound when shipped and would have been merchantable on arrival after a normal voyage, and that had it not been for the delay due to the stranding of the vessel, the loss would not have occurred despite the perishable nature of the cargo."

The controlling question in the case, as to whether the delay was the proximate cause of the loss, or whether the decay or inherent vice was such cause, was then stated in these terms:

"The sole question is whether in these circumstances the stranding should be regarded as the proximate cause of the loss. Respondent contends that decay or inherent vice was the proximate cause. It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance. But in that class of cases, as well as in others, the proximate cause is the efficient cause and not a merely incidental cause which may be nearer in time to the result."

Following this, the opinion analyzed and discussed a number of prior decisions on the subject, both English and American. Of these, the discussion by Lord Shaw in *Leyland Shipping Company v. Norwich Union Fire Insurance Society*, (1918) A. C. 350, 368-371, may be repeated here. The language of Lord Shaw, in his opinion there, was quoted as follows:

" 'To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

" 'What does "proximate" here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.' "

Consideration of this and the other authorities, cited in the opinion, led to the conclusion that the loss in question was covered by the terms of the general coverage clause in the policy. This conclusion was stated, in the opinion, in the following terms:

"We lay on one side cases of protracted voyages caused by storms and the special questions to which their varied circumstances give rise. Such a case is not before us. The instant case is one of stranding, a sea peril insured against, and we think that the well-settled doctrine of proximate cause, meaning the real efficient cause of the loss, requires the conclusion that, upon the assumptions of fact we stated at the outset, the loss of the cargo was within the general coverage clause of the policy."

MR. JUSTICE MCREYNOLDS and MR. JUSTICE SUTHERLAND were of opinion that the case was cor-

rectly decided by the court below on grounds adequately stated.

The case was argued by Messrs. George Forbes and Henry L. Wortche for petitioner, and Mr. D. Roger Engler for respondent.

Summaries of Holdings in All Other Opinions in January (except Jan. 31)

Suretyship—Public Contracts—"Labor or Material" Defined

Standard Accident Insurance Company vs. United States for the use of Powell, etc. 58 Sup. Ct. Rep. 314; 82 Adv. Op. 280. [No. 41, decided January 3, 1938.]

Certiorari involving the interpretation of U.S.C. Title 40, § 270 which provides for surety bonds on United States public building contracts and permits any unpaid person or corporation which has furnished labor or material on such a contract to recover against the surety. Here, a railroad sought to recover against a surety for freight charges.

Held, in an opinion by MR. JUSTICE MCREYNOLDS, that freight carriage is "labor or material" within the meaning of the Statute and that the fact that the carrier might have enforced payment by withholding delivery does not justify exclusion of the carrier from the benefits of the statute.

The case was argued on December 8, 1937, by Mr. Stuart B. Warren for the petitioner, and by Mr. John Bell for the respondents.

Bankruptcy—Liability of Trustee—Deposits of Trust Funds

United States ex rel Willoughby vs. Howard. 58 Sup. Ct. Rep. 309; 82 Adv. Op. 271. [No. 30, decided January 3, 1938.]

Certiorari involving the question whether a trustee (or receiver) in bankruptcy and the surety on his official bond can be held liable for the loss resulting from the insolvency of the bank in which the estate's funds were deposited, if it is one of the depositories designated by the court under U.S.C., Title 11, § 101.

Held, in the opinion by MR. JUSTICE BRANDEIS; (1) that by common law every trustee has the duty of exercising reasonable care in the custody of the estate unless relieved of that duty by agreement, statute, or order of court; (2) that U.S.C., Title 11, § 101, requiring Bankruptcy courts to designate banking depositories for money of bankrupt estates does not relieve the trustee of the common law duty but merely limits his discretion; (3) that the court's order designating a certain bank among others, as a depository did not relieve him of that duty, since it left him free to select any one or more of the other designated depositories; and (4) that the Bankruptcy Act was not intended to establish a depository system, similar to that for public funds, which would relieve trustees of their official duty to exercise due care as to the stability of these depositories, since the funds of such estates are private.

The case was argued on November 10, 1937, by Mr. Walter E. Beebe for the petitioners and by Mr. Lloyd Heth and Mr. Julius Moses for the respondents.

Federal Income Taxation "Party to the Reorganization" Defined

Helvering, Commissioner etc., vs. Bashford. 58 Sup. Ct. Rep. 307; Adv. Op. 278. [No. 33, decided January 3, 1938.]

Certiorari involving the interpretation of the words "party to the reorganization" as they are used in § 112(i)(2) of the Revenue Act of 1928 which excludes from Federal income tax base, stock of companies which are parties to the reorganization by which the stock was acquired. Here the Atlas Company, in order to eliminate three competitor corporations, had arranged through the individual stockholders of the competitors for a transfer of their stock to a new company which became owner of all the stock and assets of the three competitors. Atlas became owner of a controlling interest in the new company and in exchange for the stock of the competitors, gave their former holders some common stock of the new company, some Atlas stock, and some cash, supplied by Atlas. The taxpayer here is a former stockholder of one of the competitors, and he contends that the Atlas stock which he received should not be included as "gain" for income tax purposes because Atlas was "a party to the reorganization" under the statute.

Held, in an opinion by MR. JUSTICE BRANDEIS, that the Atlas stock was "other property" not stock of "a party to the reorganization" within the meaning of the statute under the test laid down in *Groman* v. *Commissioner*, decided Nov. 8, 1937. The opinion rejects the contention that because Atlas acquired the stock in the course of the proceedings it became a party, on the ground that this ownership was merely transitory pending an immediate transfer to the new company and that the continuity of interest required to make Atlas a party was lacking.

MR. JUSTICE ROBERTS took no part in the case. MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER dissented.

The case was argued on October 21, 1937, by Mr. J. Louis Monarch for the petitioner and by Mr. Walter G. Moyle for the respondent.

Joint Stock Land Banks—Creditors Suit—Double Liability—Res Judicata

Christopher, etc. et al vs. Brusselback et al. 82 Adv. Op. 301; 58 Sup. Ct. Rep. 350. [No. 108, decided January 3, 1938.]

Certiorari to review Ohio district court dismissal of complaint in creditors action to collect statutory double liability from stockholders of an Illinois Joint Stock Land Bank under U.S.C. Title 12, § 812. The complaint merely set up a prior Illinois decree to which defendants here were made parties but in which they were never served with process. The Illinois suit had decreed the bank insolvent and awarded the statutory assessment to the creditors. The complaint here did not allege the bank's insolvency or show any reason for the assessment other than the Illinois decree.

Held, in an opinion by MR. JUSTICE STONE, that the complaint did not state a cause of action under the Federal Farm Loan Act, since the liability imposed by the statute is personal and can only be enforced against those stockholders who are within the jurisdiction of a court which can render an *in personam* decree against them, and this is the only cause of action which the statute gives the creditors. The opinion holds that here there has been no statutory warning requiring the stockholder by virtue of his membership to permit the corporation to stand in judgment for him, even though he is not personally served with process, since the statute here involved fixed only the conditions of lia-

bility, leaving the creditors as their only recourse, the usual procedure in the courts as a means of asserting it. Therefore, the Illinois suit is not *res judicata.*

MR. JUSTICE BRANDEIS and MR. JUSTICE CARDOZO took no part in the case.

The case was argued on December 16, 1937, by Mr. Wellmore B. Turner for the petitioners and by Mr. J. Arthur Miller for the respondents.

Constitutional Law—Legislation—Presidential Veto

David A. Wright vs. The United States. 58. Sup. Ct. Rep. 395; 82 Adv. Op. 363. [No. 37, decided January 17, 1938.]

This case presented questions similar to those involved in the "Pocket Veto Case," 279 U. S. 655. The holding of the court was defined by the CHIEF JUSTICE as follows:

"We hold that where the Congress has not adjourned and the house in which the bill originated is in recess for not more than three days under the constitutional permission while Congress is in session, the bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of the House within the prescribed ten days and the Congress does not pass the bill over his objections by the requisite votes. In this instance the bill was properly returned by the President, it was open to reconsideration in Congress, and it did not become a law."

MR. JUSTICE STONE filed a separate opinion in which MR. JUSTICE BRANDEIS concurred. He did not differ as to the result. His point of divergence from the opinion of the majority appears from the opening statement of his opinion, which is as follows:

"I agree that the legislation now in question did not become a law, not, as the Court holds, because the bill vetoed by the President was returned to the Senate or to any person authorized to receive the bill in its behalf, but because the Senate by its adjournment prevented the return and thus called into operation the provision that the bill 'shall not be a Law' where adjournment prevents its return to the house in which it has originated within the ten days allowed to the President to sign or disapprove it."

MR. JUSTICE CARDOZO took no part in the case.

The case was argued on November 16, 1937, by Mr. Ashby Williams for the petitioner and by Mr. Assistant Attorney General Whitaker for the respondent.

Federal Income Taxation—Party to the Reorganization Defined

Minnesota Tea Company v. Helvering. 58 Sup. Ct. Rep. 393; 82 Adv. Op. 376. [No. 106, decided January 17, 1938.]

This is the final opinion of MR. JUSTICE SUTHERLAND. He held that a reorganization in which the general plan was the transfer of assets of one corporation to a new corporation upon an agreement that the stockholders of the second corporation pay the debts of the first, and in which the method adopted was to turn over the assets of the old corporation (except money) to the new corporation and to distribute the money among the stockholders, to be used by them for the payment of the debts of the old corporation, was a form of corporate reorganization in which there was no taxable gain to the stockholders.

MR. JUSTICE CARDOZO took no part in the case.

The case was argued on December 16, 1937 by Mr. James G. Nye for the petitioner and by Mr. J. Lewis Monarch for the respondent.

Municipalities—Composition—Taxation

Ocean Beach Heights, Inc., et al vs. Brown-Crummer Investment Co., et al. [No. 10, decided January 17, 1938.] 58 Sup. Ct. Rep. 385; 82 Adv. Op. 380.

A municipal corporation was organized under Florida law and the plat of the municipality included two separate parcels of land at a considerable distance from the main body of the new municipality, and separated therefrom and from each other, by intervening land and water. MR. JUSTICE BUTLER held, on the authority of decisions of the Supreme Court of Florida construing the relevant Florida statutes, that disconnected and non-contiguous tracts of land could not be incorporated into a single municipality and that the effort so to do was ineffective and void; even if assented to by the owners thereof; that taxes on land so detached levied for the payment of obligations of the municipality, were unenforceable and void.

The case was argued on December 8, 1937 by Mr. Henry K. Gibson and Mr. J. Julien Southerland for the petitioners and by Mr. Giles J. Patterson and by Mr. T. J. Blackwell, for the respondents.

Indian Lands—Land Patents—Date of Taking

The Creek Nation vs. United States. 58 Sup. Ct. Rep. 384. 82 Adv. Op. 379. [No. 140, decided January 17, 1938.]

In a previous case, 295 U. S. 103, a judgment of the Court of Claims was reversed and remanded for new trial. On the new trial, a question arose as to the date of the taking of land by the Government from the Indian owners and the amount of interest on the award for its value. On these points the case came again to the Supreme Court, and MR. JUSTICE ROBERTS held that the taking should be considered as of the date of the patents which the Government had used for the transfer of the various parcels, unless a substantial interval elapsed between date of the certificate and of patent, in which case the date of the certificate should be deemed the date of the taking.

The case was argued on January 3, 1938 by Mr. W. W. Spalding for the petitioner and by Mr. N. A. Townsend for the respondent.

Veterans—Reclamation of Property by Descendants

United States of America vs. Stevens, Adm'x. et al. 58 Sup. Ct. Rep. 388; 82 Adv. Op. 383. [No. 143, decided January 17, 1938].

MR. JUSTICE BLACK held valid a contract entered into between a veteran and the United States by which, upon admission into a National Soldiers' Home, the veteran's personal property was transferred to the Home, subject to be reclaimed within five years by any legatee or person entitled to receive the property by inheritance. Here the wife and children of the veteran had no knowledge of his whereabouts, of the fact of his ownership of property, or of the contract for its transfer to the Home until more than five years after his death. The title was, therefore, held to be vested in the United States free from the claims of the veteran's descendants.

MR. JUSTICE CARDOZO took no part in the case.

The case was argued on January 3, 1938 and January 4, 1938, by Mr. Paul Campbell for the petitioner and by Mr. James E. Carroll for the respondents.

Veterans Insurance — Statutes — "Other Allowances" Defined

United States vs. Jackson. 58 Sup. Ct. Rep. 390; 82 Adv. Op. 386. [No. 199, decided January 17, 1938.]

The question in this case was whether the Econ-

omy Act of March 20, 1933, repealed Section 401 of the War Risk Insurance Act, and thereby deprived veterans and their beneficiaries of automatic insurance. It was held in an opinion by MR. JUSTICE BLACK that the words in the Economy Act "other allowances" did not include "automatic insurance" under the War Risk Insurance Act, and did not operate to reduce or terminate insurance of that class.

MR. JUSTICE CARDOZO took no part in the case.

The case was argued on January 5 and January 6, 1938, by Mr. Fendall Marbury for the petitioner and by Mr. R. K. Wise and Mr. Warren E. Miller for the Respondent.

Indians—Indian Country Defined

United States vs. McGowan. 58 Sup. Ct. Rep. 286; 82 Adv. Op. 305. [No. 138, decided January 3, 1938.]

Certiorari to determine the applicability of U. S. C., Title 25, § 247, to the Reno Indian Colony. The statute provides for the forfeiture of vehicles introducing intoxicants into "Indian country" in violation of law.

Held, in an opinion by MR. JUSTICE BLACK, (1) that the Reno "colony" falls within the words "Indian country" used in the statute and (2) that the statute as thus applied does not deprive the State of Nevada of sovereignty over the area, since enactments for the protection of Indians only affect the operation of state laws within the colony to the extent that there is a conflict between the state and federal law.

MR. JUSTICE CORDOZO took no part in the case.

The case was argued on December 17, 1937, by Mr. William H. Ramsey for the petitioner.

Constitutional Law—Due Process—Public Utilities —Valuation for Rate Making

McCart et al vs. Indianapolis Water Company. 58 Sup. Ct. Rep. 324; 82 Adv. Op. 315. [No. 90, decided January 3, 1938.]

Certiorari in which a utility challenges as confiscatory certain rates fixed by the Indiana Public Service Commission. The district court had valued the company's property as of April 1, 1933 and found that this valuation was the fair and reasonable value on the date of its findings (Nov. 29, 1935) and would continue to be so for a reasonable time in the future. The company's earnings, at the rates fixed by the Commission, would be slightly in excess of 6% on that value. The district court, therefore, dismissed the complaint. The circuit court held that the district court erred in determining in its decree that the April, 1933 valuations were applicable on November, 1935 without taking account of the intervening upward trend of commodity values. It, therefore, reversed and remanded for further proceedings.

Held, PER CURIAM; that since the circuit court did not find or require the district court to find confiscation, but merely took judicial notice of price trends without applying them, it should be made clear that on the rehearing in the district court all questions pertinent to confiscation would be open. The court stated that the valuation as of November, 1935 should have a basis in evidence which would clearly show in the light of economic changes since 1933 whether the prescribed rates were confiscatory. It, therefore, remanded the cause to the district court for further proceedings in conformity with its opinion.

MR. JUSTICE BLACK dissented in an opinion which discusses at length various aspects of valuation for rate making as applied to the facts in the record and in which he concludes that the district court's judgment should be affirmed for the reason, among others, that the evidence does not clearly establish that the rates fixed by the Commission could confiscate any substantial investment of the company's stockholders.

MR. JUSTICE CARDOZO took no part in the case.

The case was argued on December 15, 1937, by Mr. Urban C. Stover for petitioners.

JUNIOR BAR NOTES

BY PAUL F. HANNAH

Secretary of Junior Bar Conference

WITH the appointment of sixty local directors of Public Information, the issuance of the Manual for Directors and the preparation of bibliographies on seventeen topics, the Conference's Public Information Program last month passed from the stage of preparation into that of full activity.

The general topics within the scope of the program this year are "The Administration of Justice" and "American Citizenship." The latter topic was added to the Conference program at a joint meeting of the Conference Council and the American Bar Association American Citizenship Committee, where the Council agreed to utilize the Conference machinery for a nation-wide speaking campaign on various phases of American citizenship.

The local directors of the Public Information Program, word of whose appointments had reached National Director Milford Springer before January 20th, are:

Gerald D. White for Grand Rapids, Michigan; Phillip Herrick for Washington, D. C.; C. J. Killoran for Wilmington, Delaware.

In Georgia, W. H. Young for Columbus; George L. Converse for Valdosta; Edwin D. Fulcher for Augusta; J. Alton Hosch for Athens; and Edward A. Dutton for Savannah.

In Missouri, Elgin T. Fuller for Hannibal; Robert E. Seiler for Joplin; Jack Curtis for Springfield; Ronald S. Reed for St. Joseph; Jack O. Knehaus for Cape Girardeau; D. W. Carrington for Kansas City; and Richard S. Jones for St. Louis.

In Kansas, James N. Snyder for Leavenworth.

In Wisconsin, Fred L. Luehring for Milwaukee.

In Mississippi, Pat D. Holcomb for Clarksdale; David Cottrell, Jr. for Gulfport; Frank E. Everett, Jr. for Greenwood; Don T. Townsend for Greenville; Gibson B. Witherspoon for Meridian; John C. Satterfield for Jackson; Leonard E. Nelson for Vicksburg; and Oliver M. Hornsby for Natchez.

In California, Maurice Hindin for Los Angeles.

In Arkansas, Gerland P. Patten for Little Rock.

In New Jersey, Joseph E. Monaghan has been made State Director.

In Nebraska, Robert A. Fitch for Omaha; and L. R. Rickets for Lincoln.

In Iowa, Francis Mullen for Fort Dodge; Tom Hollowell, Jr. for Fort Madison; Herbert Hauge for Des Moines; J. D. Beardsley for Sioux City; Bailey Webber for Ottumwa; Francis McLaughlin for Davenport; Procter R. Perkins for Council Bluffs; J. W. Pattie for Marshalltown; William Spencer for Oskaloosa; C. J. Lynch, Jr. for Cedar Rapids; Richard C. Davis for Iowa City; F. L. Bedell for Newton; John Calhoun for Burlington; Kenneth Neu for Mason City; Craig Kennedy for Waterloo; and Robert Valentine for Centerville.

In Illinois, Willet N. Gorham for Chicago.

In Pennsylvania, Gilbert Nurick for Harrisburg; Raymond T. Law for Scranton; William Taylor, Jr. for Media; John H. Jordon for Bedford; Alvin W. Carpenter for Sunbury; Walter E. Rose, Jr. for Johnstown; Paul Selecky for Wilkes-Barre; Thomas M. McDowell for Bradford; John E. Dwyer for Erie; and J. S. Richman for Philadelphia.

In Maryland, Samuel H. Feldstein for Baltimore.

In Virginia, William T. Muse for Richmond.

State Chairmen who have made no appointments are urged to do so at once. A local director should be appointed for each metropolitan area.

The Manual for Local Directors, prepared by Milford Springer in cooperation with the Conference officers and Ralph Quillian, Chairman of the American Citizenship Committee, has been sent to the State Chairmen and Local Directors. This Manual contains full directions for organizing and conducting local speaking programs. Extra copies of this Manual will be supplied by American Bar Association headquarters upon request.

The bibliographies upon topics within the scope of the speaking program were prepared by members of the Conference in Washington, D. C., who offered to serve as a research group in aid of the National Director. Bibliographies which have been mimeographed and distributed to the Conference's "official family" are: "The Privilege of Voting" by Mildred Gott Bryan; "Legal Aid Work" by Verna Parsons Young; "The Lie Detector" by Evelyn Gunion Dutcher; "Probation and Parole" by Elizabeth V. Franzoni; "The Unauthorized Practice of Law" by William J. Rowan; "Legal Education and Admission to the Bar" by Percy H. Russell, Jr.; "The Functions of the Department of Justice" by John L. Laskey; "Administrative Tribunals" by Wilbur N. Baughman; "The Constitution" by Justin L. Edgerton; "Judicial Selection and Tenure" by Charles Effinger Smoot; "Professional Ethics and Grievances" by Helen Prentiss Culhane; "The Relation of a Citizen to His Government" by Zelda Dove; "Criminal Law and Its Enforcement" by F. T. McFeeley; "Public Defender Systems" by Frederick Ballard; and "Uncle Sam's Scotland Yard" by John R. Reed.

Additional copies of the bibliographies may be obtained by request from American Bar Association headquarters.

The Office of the Attorney General of the United States is sending to all local directors a compendium of the Attorney General's Conference on Crime, a booklet entitled "How to Fight Crime," and a pamphlet on the "Organization and Functions of the Department of Justice." The Federal Bureau of Investigation is sending to the directors information concerning the organization and functions of the Federal Bureau of Investigation and on personnel and training of the Bureau's staff, together with copies of the latest addresses of J. Edgar Hoover on the cost of crime, the citizens' role and accomplishments of Federal crime control, and memoranda on the Urschel and Bremmer kidnapping cases and on the Dillinger case.

Massachusetts seems to be leading in actual accomplishment in the Public Information Program. From September, 1937 to the end of the year, speaking engagements have averaged approximately one a week. In addition, James Russell, State Chairman, organized a group of 50 young lawyers who made a total of 150 speeches at meetings and over the radio in aid of the local Red Cross drive. Due credit was given the Junior Bar Conference in each case. Since the first of the year, four speeches have been given under the auspices of the Conference or the Committee on American Citizenship.

Plans for execution of the Conference Program in the First, Second and Third Circuits were formulated at a meeting of the leaders in those circuits with President Vanderbilt in Newark, New Jersey, on January 9th.

Present at the gathering, in addition to the Association President, were: Weston Vernon, Jr., Chairman; Richard H. Field and Joseph Harrison, Council members from the First and Third Circuits respectively; Leslie P. Hemry, Robert G. Burke and William Lord, Jr., Membership Committeemen from the First, Second and Third Circuits respectively; J. Ronald Regnier, Alfred T. White, Joseph D. Calhoun, and Guy Tobler, State Chairmen for Connecticut, New York, Pennsylvania and New Jersey; and Joseph Monaghan, State Director of Public Information for the State of New Jersey. Mr. Field and Mr. Tobler are also members of the Committee on American Citizenship.

A regional meeting of the Ninth Judicial Circuit, embracing the States of Washington, Oregon and California, was held in San Francisco under the leadership of Grant B. Cooper, Council member for the Ninth Circuit, during the latter part of January. Attending were members of the Conference official family and of the American Citizenship and Advisory Committees. A full report of the meeting, which was held too late to be fully covered in this issue, will be made later.

A regional meeting of the Conference in the State of Texas is being planned by Allen Melton, State Chairman, for late February. Weston Vernon, Jr., Chairman of the Conference, Vice Chairman Harold Wahl, and Council Member Peyton Bibb, are expected to be present with the several hundred Texas members who will attend. A full and interesting program for the meeting is being planned.

A Roster of the Conference membership, revised to January 1, 1938, will be sent to the Conference membership early in February.

With the Roster is being sent a questionnaire which each member is asked to fill out and return to Donald B. Hatmaker, Chairman of the Activities Committee. The principal purposes of the questionnaire are to obtain the views of the membership as to activities in which the Conference should engage, and ascertain the phases of Conference work in which the individual member is willing to participate. Each member is asked to fill out the questionnaire and return it promptly.

CHAIRMEN OF ASSOCIATION COMMITTEES FOR 1937-38

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE ROENTGENOLOGIST IN COURT, by Samuel Wright Donaldson. 1937. Springfield and Baltimore: Charles C. Thomas. Pp. XII, 230.—This book, by an eminent authority in roentgenology, is meant for the guidance of those practitioners in their contact with the law's labyrinth. Nevertheless, it is edifying to the lawyer to find here the variety of new ways in which old principles can come into application.

The chapter-headings best show the scope of the book: II, Relationship between Physician and Patient; III, Malpractice; IV, Physician and the Law of Agency; V, Malpractice, Defense and Prophylaxis; VI, Evidence and Testimony; IX, Expert Witness Fees; X, X-ray Films as Evidence; XI, Ownership of Films; XII, Physicians and Contracts; XIII, "Doctor, Take the Stand."

I said that lawyers could profit by perusing this book. A most important lesson for them would be to learn that there is a difference between a technician (or, operator taking the roentgenogram) and a roentgenologist; the latter is an expert in discerning the anatomical meaning of the picture, the former is not, and even the ordinary competent physician may not be. Courts are now beginning to hold, in personal injury cases and malpractice cases, that a roentgenogram *must* be interpreted on the stand by a specialist.

The best thing that I found in the book is the Twelve Commandments (the author moderately terms them "suggestions," p. 187) for a medical witness called to the witness stand. Every counsel using medical witnesses should copy this out (with due acknowledgement!) and serve a copy on his witness before trial; an observance would clarify many a trial.

Just one thing more. In the chapter on Malpractice nothing could be found on the subject of a physician's liability insurance policy. This subject has two aspects worth mentioning here. The first is the effect of recent Bar Association action to suppress "unauthorized practice" on the service of the insurer in these policies. Recently such action has caused the cancellation of policies by one company. A policy now lying before the reviewer engages "to defend the assured in any suit" etc.; it would be interesting to know how these policies vary and which of their forms remain immune from attack.

The other thing concerning malpractice suits (which, by the way, have been largely on the increase) is the difficulty of persuading reputable physicians to take the stand for the plaintiff against a fellow-physician as defendant. The medical Canons of Ethics do not expressly forbid this, but the understanding that they do is frequently found. It is said that one form of liability policy even engages the insured not to testify against a fellow-physician. This attitude is not an admirable one. The American Bar Association Committee on Improvements in the Law of Evidence is recommending that a joint committee with the American Medical Association confer to reach a common understanding and a solution.

JOHN H. WIGMORE
Northwestern University
School of Law

Law and Other Things, by Lord Macmillan. 1937. Cambridge, England: Cambridge University Press and Macmillan. Pp. vii and 284.—This little book contains sixteen varied essays. Most of them appeared first as lectures before British universities and learned societies.

The book is a pleasing example of the sort of collateral writing which is so familiar in the bar across the Atlantic and so rare in the American profession. There flows in England a little stream of books about the lawyer's life, his literary excursions, his comment on world affairs and all sorts of things that have only an indirect bearing on the daily routines of professional life. The stream derives chiefly from the mountains of the bench and bar but seems to be quaffed eagerly by the lawyers on the plains and those still climbing to eminence. Perhaps a great lawyer over there does not consider his career quite complete unless he has printed at least one somber book on a technical topic like "Sewers" or "Criminal Appeals" and one or two little adventures into history, biography or some other by-path.

Lord Macmillan was a Scottish advocate. He was born sixty-five years ago and named Hugh Pattison Macmillan. He is the son of a Greenock minister. He carried off the usual sequence of university prizes which are the milestones along a brilliant career in his field, took degrees at Edinburgh and Glasgow, came to the front rank of advocates at home and then in London and served with applause on many public commissions. He edited the "Juridical Review" for some years, long ago. He now holds a life peerage, and in recent years has been sitting as a "Lord of Appeal in Ordinary" in the highest of British tribunals.

The papers now gathered and printed are mostly recent addresses. One of the briefer inclusions is Macmillan's speech as a visitor with us in Chicago in 1930, on "Law and Letters." Three of the papers deal with that meteor, Lord Birkenhead. The rest are about politics, religion, history, language and so on from a lawyer's stance or are musings about the lawyer's own business, dealing with the arts of advocacy, the peculiarities of Scotch law and of the professional mind. All are artfully written, sprinkled with quotations, literary turns, shrewd comments and no little humor. The out-

look is rather conventional; the skill of presentation high.

The veteran can read the book of an evening in an arm-chair with no effort, some enjoyment and some envy for the accomplishments of the British bar. The beginning lawyer can gather many hints about the curious craft we ply. He will find himself in the company of a wise man and a versatile companion.

JAMES GRAFTON ROGERS

New Haven

The History and Development of the Fourth Amendment to the United States Constitution, by Nelson B. Lasson. 1937. Baltimore: The Johns Hopkins Press. Pp. 143.—The author of this treatise, which is one of the series of Johns Hopkins University studies in historical and political science, is lecturer in political science at the University of Maryland.

Starting with Rome, he traces thoroughly the repressions and outbursts of personal freedom through English law and its precursors. He shows that the sacredness of home and person was asserted many years before the Bill of Rights but that its assertion was more honored in autocratic violation than in observance.

The waves of freedom-consciousness that swept through Great Britain received a severe set-back in the issuance of Writs of Assistance to collectors of revenue in the colonies. The feeling engendered by Crown revenue policies was primarily responsible for the Fourth Amendment. It is interesting that the Amendment as originally drafted by the House Committee is not nearly so strong as the one now in existence. The present Amendment, although finally passed by both House and Senate, may have been the result of some unique backstairs draftsmanship, and its only appearance on the floor prior to final passage was met with stinging defeat.

The final phase of the treatise is the development of the Amendment through the Supreme Court. This section contains a scholarly history of the application of the Amendment to individuals, its interpretation in connection with the Fifth Amendment, its application to the rights of corporations and to the powers of the states.

In a period when "searches and seizures" is a subject of interest not only to lawyers but to all business men, this lucid, non-ponderous, but thorough pamphlet is a requisite for every constitutional library.

LOGAN MORRILL

Cincinnati

An Annotated Bibliography of Robert M. La Follette: The Man and His Work, by Ernest W. Stirn. 1937. Chicago: University of Chicago Press. Pp. 571.—The "early period" (1855-1885) of La Follette's life is covered in the first 25 pages of Mr. Stirn's book, not only by references to various sources but in some instances by enlightening excerpts from contemporaneous publications. Then follow 531 pages of citations numbering well into the thousands—at a guess at least 10,000. Included are 250 pages of references from the "New York Times-Index," 181 pages from the Congressional Record, "New York Tribune" 4, "Readers Guide to Periodical Literature" along with a Supplement to this Guide, and "International Index to Periodicals," 55 pages. The volume betokens a prodigious amount of work on the part of the compiler. From such citations and references as your reviewer, in the short time available to him, was able to check, it seems that the citations are accurate and the references appropriate. The lack of a general "Subject Index," with liberal cross-indexing, greatly impairs the usefulness of the work. Equipped with such an index the book would be invaluable to anyone undertaking to write or to inform himself either as to La Follette or as to the multitude of progressive ideas and actions embodied in La Follette's life.

RUSSELL WHITMAN

Chicago

How Lawyers Think, by Clarence Morris. 1937. Harvard University Press. 144 pages.—This little book by Dean Morris of the University of Wyoming, who is also professor of law, is interesting, suggestive and eminently readable. Not only law students and graduates of law schools entering upon professional practice, but lawyers of experience should read it very attentively. It will entertain and instruct them.

However, it will not teach any reader "how to think." Lawyers do not think differently from engineers, ministers or social workers. Nor does the study of formal logic help us much if we are not *naturally* logical in our thinking. Rash men, men who jump at conclusions, men who indulge in wishful thinking and ignore or minimize facts they dislike, will not be taught to think correctly, soundly, scientifically by any amount of illustration of fallacious thinking or of clear and logical thinking.

The lawyer solves problems and gives advice. His equipment consists of principles mastered in school, or private study, volumes of decided cases, standard books of authority, and congenital ability to reason. Reason is the life of the law, said Coke. Some mechanics reason better than some lawyers. Prejudice, self-interest, class interest, the influence of associations are among the major causes of poor legal thinking, as of poor economic or political thinking. Madam, said Dr. Johnson, I can give you arguments, but I cannot give you understanding.

Law students, of course, should be impressed with the necessity of weighing evidence, considering all sides of a problem, seeking light honestly, and distinguishing between certainty, probability and possibility. Some will profit by such teaching. Others will not; these will make poor lawyers and poor judges.

* *

Time's Arrow in Society, by Anderson Woods. 1935. Chicago: University of Chicago Press. 234 pages.—This is a very thoughtful book, written in a style almost Spencerian, on modern society and its pressing and menacing problems. The author belongs to no political school; he freely and vigorously criticises most of the existing schools, not hesitating to say that both the conservative and the radical are "fools to the extent that they would arrest or invert the universal process." He himself, however, says very radical things in a very quiet, conservative manner. Most of the conservatives, and many liberals, will disagree with him on the question of the right principle of property distribution, which is virtually communistic. But many of his other positions are eminently reasonable, though hardly within the field of practical progressive politics. One may call particular attention to his discussion of social compulsion vs. moral suasion, education and habit-formation, international co-operation, the future of property, the relationship between competition and monopoly.

He starts with a system of basic concepts, chief of which is this—that there is "a general law of nature

by which discordant, contending elements gradually effect mutual adjustment and achieve a state of harmony and cooperation." In economics, it is argued, this law must lead to ever-expanding collectivism though with a minimum of violence and regimentation. In politics, it must lead to a federation of the world, cultural diversity, autonomy, and the abolition of war.

Mr. Wood does not limit himself to sweeping generalizations. He very patiently applies his fundamental concepts to specific contemporary issues—industrial disputes, birth control, eugenics, taxation, etc. He has written a scholarly, valuable book which, if read with attention and freedom from prejudice, cannot fail to prove elevating and enlightening.

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Crime Control by the National Government, by A. C. Millspaugh. 1937. Washington: The Brookings Institution. 306 pages.

Later Criminal Careers, by Sheldon and Eleanor Glueck. 1937. Boston: The Commonwealth Fund. 400 pages.

No civilized nation is as crime-ridden as the United States. Americans have been called a lawless people, and the average American is believed to entertain a sneaking admiration for the resourceful and successful criminal. It is of course notorious that certain semi-criminal and lawless occupations and businesses are not only tolerated, but protected, by local police systems and political machines.

That we have too much crime; that our efforts to suppress crime are inefficient and wasteful, and that our results are meager, everybody recognizes. But just what can we do to improve the situation, to reduce crime, to enhance the efficiency of our law-enforcing agencies, federal, state and local?

Upon these questions there is but little systematic or dependable information even in the legal profession, or in legislative halls. The first book under notice, written for the Brookings Institution and published by it, is very timely and welcome indeed. It is scientific in tone and spirit, and valuable alike for the information it conveys, the definite suggestions it makes and the modern philosophic viewpoint which animates and pervades it. Students of the crime problem in any of its numerous aspects will find in it a truly liberal education. It is a book to read attentively, to consult in connection with specific questions as they arise, and to re-read at intervals.

Among the topics treated are these: The federal crime control agencies, their distribution and their development—or rather their Topsy-like growth; the gradual extension of federal action in the sphere of crime control; the forms and degrees of federal-state co-operation; the statistics of crime and the need of sounder and better statistics; the conflict between crime control and crime prevention; needed reforms, federal and state; the present trends and the outlook for the future.

There are many arresting statements in the book, though it does not try to be sensational. Lack of space forbids quotation, but one sample must be given: "At present we are unable to tell whether crime is increasing or decreasing, except in a few categories and there only roughly."

There are no panaceas for crime. But we can do more than we have done to coordinate control efforts, promote preventive work and facilitate investigations and intelligent comparisons. Constitutional limitations stand in the way of genuinely effective co-operation, but they do not warrant passivity, timidity or despair.

What happens to the "graduates" of a typical reformatory? How many of them settle down and become decent members of society, and how many continue to prey upon society and have to be fined and imprisoned again and again?

The authors of the second volume under notice published a book, entitled "500 Criminal Careers," in 1930, in which they traced the careers of graduates of the Massachusetts Reformatory during a five-year period immediately after their discharge. That work, based on careful and scientific studies, received wide and favorable notice. Now, the same authors, with equally painstaking care and approved methods, give us the results of a second investigation, which covered another five-year span of the same persons.

The conclusions are extremely illuminating, and it is truly significant to note that the authors' findings and positive recommendations coincide fully with the convictions of philosophical humanists guided by general principles and *a priori* reasoning.

Of all social groups, our lawmakers and criminal lawyers should be the first to read and ponder the work in question. They cannot fail to be impressed with the clearly indicated need of reconstructing the parole system, unifying the several agencies which now deal separately with ex-inmates of reformatories, parolees and potential recidivists, and paying more heed—much more heed—to the ascertainable causes of habitual criminality.

Space limits forbid even a brief summary of the sound and enlightened conclusions of the authors. But the purpose of this notice is to send thoughtful readers to the volume itself, which will stimulate thinking and stir earnest men and women to their depths. How short-sighted, wasteful and unintentionally cruel society is in dealing with its delinquent elements! It is sinning against the light, moreover, since a great deal can be done with available resources toward actual reclamation and rehabilitation of most of the recidivists.

VICTOR S. YARROS

Chicago

The British Yearbook of International Law. 1937. New York: Oxford University Press. Pp. 282.—The appearance of the British Yearbook of International Law is an annual event eagerly anticipated by all international lawyers. Other kinds of lawyers, as well as laymen concerned with the field, ought to be interested too, because the Yearbook offers a unique collection of timely articles which are both scholarly and readable, a rare combination for the field of jurisprudence particularly. For anyone who wishes to keep abreast of the current problems of international law but who has not the time to rummage through many learned journals or ponderous treatises, this Yearbook offers an admirable survey. The 1937 volume measures up to the high standard set by the others in the series, which is now in its eighteenth year.

The first article, "The Supreme Court of the United States as an Expositor of International Law" by Prof. Charles Cheney Hyde of Columbia University, is an authoritative discussion of the types of cases involving international law principles which have come before the Supreme Court. Lawyers engrossed with the domestic aspects of the tribunal may find revealing this exposition of the importance of the court for the

development of international law. As Professor Hyde says at the conclusion of his contribution, the cases discussed reflect the court's "ever-present realization of the bearing of international law upon the life of the United States in its contacts with the outside world . . ." International as well as constitutional law thus has excellent judicial backing.

In "Some Problems of the Spanish Civil War," the second article, Professor H. A. Smith, the author, clears up the confusion surrounding the legal relationships between outside states and the two factions in Spain. Hitherto, recognition of belligerency has been accorded in civil strife whenever the plain facts warranted it; that is, when the conflict reached the proportions of genuine warfare. Recognition of belligerency carried with it automatically a recognition of the government in revolt, recognition not *de jure* but for war purposes only. In the Spanish case, however, belligerent rights have not been accorded, though the facts of the situation demand that they be granted, because, as Professor Smith states, recognition has come erroneously to be regarded as a favor to be bestowed or withheld according to the whims and desires of outside states. The writer shows the inconsistencies in the policies of the powers toward Spain, and points out that in fact, through such arrangements as the Non-Intervention agreement, General Franco and the "Loyalists" have been treated as belligerents in many respects, though formal recognition has been denied. And why do we have this anomalous state of affairs? We have it mainly because of the war between the "isms" which has destroyed the sense of community upon which the rules of international law have rested.

Three articles in the volume are concerned with conflict of laws, and will be separately reviewed. The other topics dealt with are Egypt, the Free City of Danzig which is no longer "free" in any sense of the word, and with "Custom as a Means of the Creation of International Law." Following these longer essays, are useful notes on some twenty topics ranging from the juridical status of German refugees to extradition. Digests of significant decisions by international and national tribunals during the year, a book review section, and a bibliography round out this volume, which, as previously stated, should command the attention of lawyers everywhere.

PAYSON S. WILD, JR.

Harvard University

The Development of Dominion Status, 1900-1936. Edited by Robert MacGregor Dawson. 1937. New York: Oxford University Press. Pp. xiv, 466.

The British Empire. 1937. New York: Oxford University Press. Pp. vii, 336. Map.

The first of these volumes is an unusually useful introduction to an understanding of the most viable of contemporary political entities, the British Commonwealth of Nations. The editor has brought together a wide variety of official and unofficial documents—treaties, parliamentary debates, press comments, analytical and legal articles—to illustrate the evolution of Empire into Commonwealth. In an introduction, which occupies a little over one-quarter of the volume, he traces this evolution through its various phases before and since the great war.

The periods from 1900 to 1914 and, still more, from 1914 to 1920, were of slow but perceptible development of the recognition by London of the independence of the dominions in matters affecting foreign as well as domestic policy. The great war accelerated the process, and led to a period, immediately after it, of "tentative centralization" through the abortive attempt to create control through collaboration in an Empire Peace Cabinet. This was followed by a complete reversal, between 1922 and 1926, when the trend was toward a more or less complete "decentralization," in matters of foreign policy. Finally, the last decade has been one of "equal status" during which practical collaboration has been achieved without Downing Street control. It is this later development which, especially since the Statute of Westminster, has profoundly altered not only the constitutional but the psychological relations between the mother country and the dominions.

Professor Dawson's comments, and the documents which he has skilfully selected and arranged, illustrate this evolution for the layman as for the student. He devotes over one-quarter of his own analysis and of the documentary materials to this latest phase; its importance for the present and the future of the British Commonwealth is illuminated for the Empire citizen and the foreigner by this timely essay.

The second volume is a survey by the Royal Institute of International Affairs of the countries of the Empire, the fabric of the Empire, and imperial problems. Even more contemporary than Professor Dawson's survey, it examines existing political conditions in the colonies as well as the dominions, and traces the elusive characteristics of the institutions, laws, and conventions which hold the "fabric" together. The last section of this study explores such questions as defence, foreign affairs, economic policy, population and migration, and nationality and citizenship. Its purpose is to explain rather than to argue, to portray rather than to appraise. It is an admirable summary of present-day conditions and problems in perhaps the most interesting and certainly the most intangible of contemporary political unities.

PHILLIPS BRADLEY

Amherst College

The Colonial Problem: A Report by a Study Group of Members of the Royal Institute of International Affairs. 1937. New York: Oxford University Press. Pp. 448.—While the United States is not immediately concerned with the explosive issue of a new deal in colonial control, our own ability to stay out of another war will be intimately affected by whether or not a peaceful solution of the problem can be achieved. This study, published by the Royal Institute of International Affairs of London, is a model of impartial and penetrating appraisal. It *should* do much to clarify the antitheses producing the present tensions over reshuffling colonies.

The study dissects the problem into three principal components—its international, colonial, and economic-social aspects. The experts from three or four countries who explore the question confront the international issue squarely. Unless some solution for the problem of collective security is found, colonies will be desired—and demanded—as a sort of national insurance policy. However futile the attempt to attain national security through colonial control (and the data presented indicates how illusory is the hope of economic self-sufficiency by way of empire), the alternative—an acceptable, and accepted, formula of collective security—is the only effective antidote to further colonial wars.

And the balance sheet of colonial profits and losses indicates how little net advantage results from their

possession. In colonial terms, the cost of maintenance everywhere runs ahead of returns. Increasingly recognized standards of administration which eliminate ruthless exploitation of native populations and create heavier fiscal burdens on home and colonial treasuries, tend to make expenditures outrun national profits from political control. And however nationalistic the fiscal, economic, and shipping policies pursued toward colonial areas, few, if any, bring the resources extracted from these dependencies within the price levels of normal international trade; most, indeed, raise costs far above these levels.

Objective throughout, and exhaustively documented, this volume is an important contribution to a more intelligent appraisal—by the "haves" as well as the "have-nots"—of the actual results of empire-building. The answer, derived from an impartial weighing of the evidence, is so plain as to appear indisputable—certainly in terms of costs and returns. The great imponderable, the prestige-value of colonial possessions, may still produce conflict; its practical results are measured here in an accounting which no prestige-returns can balance.

PHILLIPS BRADLEY

Amherst College

The Trial Judge, by Henry T. Lummus. 1937. Chicago: The Foundation Press. 148 pages.—Judge Lummus' book has received, and has fully deserved, extended reviews in the law magazines; and the reviewers have by no means agreed as to the matters which they regard as of the greatest significance and public importance. All are agreed, however, that within a surprisingly small volume this richly experienced jurist has given an admirable statement of the vital place and part of the trial judge in the administration of justice according to law, and has also put in small compass a working philosophy for trial judges who would actively fulfill their responsibility for making the work of their courts respected and acceptable.

If it can be assumed that the publication and circulation of readable books such as this make some substantial contribution to an informed and vigilant public opinion, Judge Lummus' exposition of the work of the trial judge is important and should be influential. Putting aside a strong desire to comment on the book as a whole, I may keep within enforced limitations of space by singling out two matters on which this experienced judge gives, perhaps unconsciously, a convincing demonstration:

We are living in an era in which an impression has been insistently conveyed to the general public that judges spend the most of their time in devising ways and means to annul statutes, and that the elected representatives of the people, in the executive and legislative branches of government can carry out the popular mandates for social-welfare legislation only if judges are selected for all Courts on the principal ground of their pre-arranged subservience to the immediate will of the people as embodied in legislation rather than the deliberate will of the people as contained in subsisting constitutional safeguards. Yet here is a jurist who spent practically his life in the trial Courts of a State which has pioneered in social legislation, and now sits in its highest Court of law. His testimony and demonstration are that hardly ever are constitutional questions presented for the serious consideration of a trial judge in the State Courts, and only infrequently in the appellate tribunal, and that the vast bulk of the day-by-day work of the trial Courts in administering justice between man and man calls for knowledge of the law, innate sense of fairness, firmness and vigor in keeping counsel within the relevant issues, and a continuing independence and courage in excluding all extraneous influences from the court-room, and would be harmed, not aided, by a facile responsiveness to supposed demands of electoral majorities or to political "programs" designed to combine minority "pressure-groups" into majorities. Probably the most devastating disaster which could befall the average citizen of this country would be prevalent acceptance of the insidious doctrine that all judges of all Courts should be chosen, not for competence or fairness or courage, but for their previously-announced willingness to uphold and enforce whatever measures are enacted by legislatures under partisan pressures.

Judge Lummus reminds us that impartial justice administered by law-governed Courts is a relatively new concept and has no secure foothold in many lands; that it is threatened anew by demagogues and dictators; and that even in America "the pressure against judicial impartiality is so strong and so constant that it can be resisted only by establishing the complete independence of the bench." As anyone who has served in judicial office is well aware, "a gulf exists, and must always exist, between the political mind and the judicial mind," and "practical politics is such a system of rewards and punishments and of exchanging favors, that the average man, especially one of the opposite party, cannot believe that judicial impartiality can live in its atmosphere. A born judge might be impartial even though active in politics. But few would trust him."

No citizen who reads Judge Lummus' book could wish for judges who are politically minded or are dependent on political leaders or organizations for their continuance in office. He makes it clear beyond peradventure that fearless and impartial discharge of judicial duties is impaired, often destroyed, by any system under which the trial judge owes either his election or his continuance in office to the necessity of seeking electoral majorities through the support of party organizations, racial groups, or groups specially interested in a weak or biased enforcement of law. Even as to appellate review of questions of the validity of welfare legislation, Judge Lummus agrees with the view of Chief Justice Taft that "appointed judges are more discriminatingly responsive to the needs of a community." Judge Lummus believes that the competence, impartiality and independence of the Courts ought not to be sacrificed and broken down, on any theory of thereby making the Courts more amenable to strong-willed executives; the Courts should enforce fairly and impartially the existing constitutional limitations on legislation; those limitations should be taken down only in the orderly way, by giving the people an opportunity to vote for or against such amendments; it would be of the essence of dictatorship to refuse to the people that orderly opportunity and to change the Constitution only by making the judges subservient to executive demands for disregard of limitations erected by the people themselves. The philosophy and common sense of the American judicial system are in this book; lawyers will do well to circulate it widely.

WILLIAM L. RANSOM

New York

State Control of Local Finance in Oklahoma. By Robert K. Carr. 1937. Norman: University of Oklahoma Press. Pp. 281—The title of this book is clearly indicative of its contents. The book is based on a manuscript, which, because of its exceptional merit, was awarded the Tappan Prize by Harvard University in 1935.

The Oklahoma problem with respect to state control of local finance does not appear to be greatly different than that found in other states. In Oklahoma, there have been attempts to curtail local expenditures through constitutional and legislative limitations, which, as in other states, have been largely ineffective. Failing to get the desired results, Oklahoma has supplemented these efforts by enacting legislation that vests administrative control in state agencies. Such agencies are found in the county excise board, which passes on budgets of local taxing bodies; a single court of tax review; the attorney general, who passes on bond issues; and the State Tax Commission, the County Equalization Board, and the State Board of Equalization, who seek to improve the assessment of property. In addition, some control is exercised through uniform accounting, auditing and grant-in-aid.

Although changes are required, it appears that Oklahoma has laid the ground-work for effective control of local finance. However, as pointed out by Mr. Carr, they represent a compromise between home rule and complete state control, with greater and greater reliance, through the years, being placed on administrative agencies. Mr. Carr has forcibly called this situation to the attention of the reader by calling his last or summary chapter, "Oklahoma Must Choose." He thinks that "the true choice lies between local democracy and state planning, and as one or the other may be preferred a state would probably do well to move toward complete decentralization or complete centralization." With this conclusion, there is a difference of opinion. Some authorities and states believe in complete centralization of authority in the state over local finance, while others believe in a compromise solution along the Oklahoma lines. No one seems to favor a system wherein the state does not exercise any control. While it is true that in this country we are heading toward centralization, yet it is doubtful if this is a proper move, as our government is based upon the correct theory: namely, responsible local self-government. The one sure way to prevent undue centralization is to make local government responsible and efficient and this, it is believed, can best be done through advice, rather than by compulsion, from above. It is not believed that Oklahoma must or should choose, as a compromise solution appears to be the best one available. At any rate, Mr. Carr's book is an excellent contribution to the field and should be widely read.

DENEEN A. WATSON

Chicago.

Summaries of Articles in Current Legal Periodicals

BY KENNETH C. SEARS
Professor of Law, University of Chicago

ADMINISTRATIVE LAW

AN Analysis of the Standard of Public Interest, Convenience, and Necessity as Defined by the Federal Communications Commission, Maurice M. Jansky, 6 The George Washington Law Review, 21. (N. '37; Washington, D. C.)

The Communications Act of 1934 places upon the Communications Commission the task of providing "equality" of broadcasting service "if public convenience, interest or necessity will be served thereby". Mr. Jansky has analyzed the rulings of the commission in complying with the statute. One interested in an application pending before the commission will perhaps desire to read this analysis of one of the newest fields of administrative law.

CONSTITUTIONAL LAW

Is Hugo L. Black a Supreme Court Justice De Jure? D. O. McGovney, 26 California L. Rev. 1. (N. '37; Berkeley, Calif.)

The status of Mr. Justice Black is exciting much legal curiosity. The extensive and able consideration of the question by Professor McGovney starts with the proposition that the Act of March 1, 1937 "presents some extraordinary and puzzling difficulties". His conclusions are: (1) that the justiceship to which Hugo L. Black has been appointed is not the one created by the Act of 1937 but one of the nine justiceships created by the Act of April 10, 1869; (2) that the office created by the Act of 1937 is the office of retired justice and the Constitution may bar him from this office which Mr. Black is ineligible to accept until he is seventy years of age; and (3) that it seems that the increase in emoluments by the Act of 1937 is so remote, contingent and incalculable as not to be a violation of the Constitution. There is an extensive consideration of the same subject by a group of students in 6 Geo. Washington L. Rev. 46 and this article discusses among other things the procedural difficulties in obtaining a decision of the controversy. The conclusions are a series of "if" propositions and seem too academic. In 37 Columbia L. Rev. 1212 there is a student note that discusses the legality of Justice Black's appointment which concludes: "Unless Justice Black is reappointed after the expiration of his term, his title may be attacked by an unfriendly administration in the future."

CONSTITUTIONAL LAW

The Wagner Labor Act Cases, Jacob Geffs and William M. Hepburn, 22 Minnesota L. Rev. 1. (D. '37; Minneapolis, Minn.)

The Wagner Labor Act cases have already received much discussion in legal periodicals and they are likely to be discussed frequently in future days. The present authors in their readable article believe that they probably will long remain landmarks but that it is not unlikely that the Supreme Court in cases to be decided will again indulge in subtle and refined distinctions. The Court did not repudiate such cases as Hammer v. Dagenhart and Adair v. United States

even though the reasoning in those cases cannot be reconciled with the broad interpretation of the Commerce Clause manifested in the Wagner Act cases. The authors favor the language of Chief Justice Marshall in Gibbons v. Ogden, particularly that part which states that "commerce" has the same meaning in domestic as in foreign affairs. This point of view, if ever accepted generally, was certainly forgotten. It is not argued apparently that the Wagner Act cases return to Marshall's utterance. Perhaps the authors deal too seriously with the mere utterances of the Supreme Court on the Commerce Clause. Would anything be lost, would not something be gained if the Supreme Court in passing on this clause would merely announce its decisions and avoid giving reasons therefor? Why not follow the precedent set in The National Prohibition Cases?

EVIDENCE

Evidence and the New Federal Rules of Civil Procedure: 2, Charles C. Callahan and Edwin E. Ferguson, 47 Yale L. Jour. 194. (D. '37; New Haven, Conn.)

The basis of the discussion is Rule 44 which provides that in the federal courts under the new rules, evidence shall be admitted if (1) admissible under federal statutes, or if (2) admissible heretofore in federal equity cases, or if (3) admissible in state courts of general jurisdiction in states where the federal court is held. The authors think well of this rule because they think that it means that the federal courts will have a large freedom to develop their own rules. Rule 44 provides that the competency of witnesses is to be determined in a similar manner but this provision seems to be limited by the presently existing Competency of Witnesses Act. However, state competency statutes are generally satisfactory except for the "dead man" statutes. Here the authors would make a change similar to the statute in existence in Connecticut. Rule 44 also permits impeachment of witnesses by proof of contradictory statements. It is advocated in this article that this part of the rule should be changed to permit impeachment in any manner. The authors also favor a rule that would make a radical change in the hearsay rule. They favor the admission of statements of unavailable persons if "made in good faith before the commencement of the proceeding and on the declarant's personal knowledge". There is a proposal to eliminate the privilege of a patient to prevent the testimony of physicians, surgeons, and nurses. Finally, there is a suggested rule concerning judicial notice that is designed to encourage a wider use of the principle.

LEGISLATION

Nebraska's New Legislature, Lane W. Lancaster. 22 Minnesota L. Rev. 60. (D. '37; Minneapolis, Minn.)

A survey of the results of the first session of the one-house legislature in Nebraska is written with restraint. The political scientist makes his record but he warns against conclusions except where based on extended experience. The members were selected on a non-partisan basis and a lack of political partisanship characterized their deliberations. The voters exercised good judgment in selecting the legislators. Committees were reduced from 32 and 36 to 16; rules of procedure were changed considerably; perhaps the rules emphasized deliberation unduly and the device of a committee of the whole was omitted for the next session. The session was one of the longest on record and the number of new laws was large. The expense was apparently 37% under that of the preceding two-house legislature and there is some reason to hope that the next session will show a saving of 50%. The legislators changed from opposition to approval of the one-house legislature and a majority of them are content with the non-partisan plan. There was criticism that (1) a membership of forty-three is too small to be representative; (2) that the small size increased the pressure of lobbyists and correspondence with constituents; and (3) will make too many close personal friendships that will lead to vote-trading.

PROCEDURE

H. R. 4721 (Prohibiting Comment Upon the Weight, Sufficiency or Credibility of the Evidence at the Trial of Cases in the Federal Courts), William M. Cain, 13 Notre Dame Lawyer 1. (N. '37; South Bend, Ind.)

The address by Judge Merrill E. Otis before the State Bar of California denouncing the action of the National House of Representatives in passing H. R. 4721 furnished the basis of a brief article by Professor Cain who also denounces the bill. Why does this sort of a bill present itself? The answer: "There is a kind of lawyer who becomes annoyed, even enraged, when compelled by the judge, to try the real issues in the case rather than indulge in attractive humbug and eloquent ravings over things nobody denies". This sort of a lawyer is opposed to "the old method" which has "worked well for a century and a half serving to nullify frivolous and absurd contentions of counsel which befogged real issues and misled juries to the detriment of the administration of justice".

PROCEDURE

Questions Raised by the Report of the Advisory Committee on Rules of Civil Procedure for the District Courts of the United States, Gustavus Ohlinger, 11 U. of Cincinnati L. Rev. 445. (N. '37; Cincinnati, Ohio.)

Mr. Ohlinger does not like some of the proposed rules and apparently he would like to see some of them discarded. What is more important, he thinks that these objectionable rules exceed the power given to the Supreme Court and even violate the Constitution. He objects to the obliteration of the distinction between law and equity which is part of our constitutional system. The requirement to make a claim for a jury trial "may well be questioned" as a violation of the Seventh Amendment. The most serious objection is to the rules that give the "unlimited right of discovery". Apparently these rules violate the dogma that prohibits the delegation of power by Congress to the Supreme Court. Boy, please page Dean Charles E. Clark!

A Correction Corrected

In the January issue of the JOURNAL we printed a correction to the effect that in printing the list of members of the Council of the Section of Insurance Law in our December, 1937, issue the name of Dr. Charles W. Tooke was inadvertently omitted.

It now becomes our sad duty to state that, in making the correction, with equal inadvertence, we placed Dr. Tooke on the Council of the Section of Insurance Law instead of on the Council of the Section of Municipal Law, where he properly belongs.

This apparently brings the corrections up to date.

Leading Articles in Current Legal Periodicals

Brooklyn Law Review, December (Brooklyn, N. Y.)—Magistrates' Courts of the City of New York: History and Organization, by Anna M. Kross and Harold M. Grossman; The Constitutional Guarantee of Jury Trial in New York, by Lewis Mayers.

California Law Review, January (Berkeley, Cal.)—Constitutionality of Rural Zoning, by Ralph B. Wertheimer; Applications of the Distinction Between Mortgages and Trust Deeds in California, by Joseph M. Cormack and James B. Irsfeld, Jr.; Preserving Liberty of the Press by the Defense of Privilege in Libel Actions, by John M. Hall.

Canadian Bar Review, December (Ottawa, Ont.)—The Great Seal and Treaty-Making in the British Commonwealth, by Professor Robert B. Stewart; The Operation of Description in a Contract of Sale of Goods, by J. L. Montrose; Sir Samuel Romilly, by Roy St. George Stubbs.

Commercial Law Journal, January (Chicago, Ill.)—The Future of the Profession, by Hon. L. B. Day; The Growing Bureaucracy in State Governments, by Philip Lutz, Jr.; The Rule-Making Power—Does It Lead to Judicial Supremacy? by Herbert U. Feibelman.

Harvard Law Review, January (Cambridge, Mass.)—The Retirement of Federal Judges, by Charles Fairman; Fifty Years of Jurisprudence, by Roscoe Pound; Power of Congress over State Ratifying Conventions, by Abraham C. Weinfeld.

Illinois Law Review, December (Chicago, Ill.)—Some Aspects of the Illinois Insurance Code, by Harold C. Havighurst; The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure, by Robert Wyness Millar.

Kansas City Law Review, December (Kansas City, Mo.)—The Judge to the Jury, by Merrill E. Otis; Anticipatory Breach and the Law of Life Insurance, by Robert A. Adams.

Law Notes, January (Brooklyn, N. Y.)—Two Speeches on Lawyers and our Constitution; Trial of Christ as Reported to Tiberius, by Meldrim Thomson, Jr.; The Fellow Servant Rule in New York, by Aron Steuer.

Law Quarterly Review, January (Toronto, Ont.)—Restitution, by Warren A. Seavey and Austin W. Scott; Liability for Chattels, by Stephen Chapman; Dransfield v. British Insulated Cables, Ltd., by A. L. Goodhart; Shelley's Ghost, by A. D. Hargreaves; Capacity to Make a Marriage Settlement Contract in English Private International Law, by J. H. C. Morris; Three English Documents Relating to Francis Accursius, by George L. Haskins; Custom as a Type of Law in Norway, I, by T. Leivestad.

Legal Notes on Local Government, January (New York City)—Compulsory Compositions of Municipal and District Indebtedness, by A. L. Cowell.

Maryland Law Review, December (Baltimore, Md.)—History and Constitutionality of the Maryland Income Tax Law, by Huntington Cairns; A Survey of the Maryland Income Tax Law, by James T. Carter; Constitutional Aspects of Reduction in State Property Tax, by Herbert M. Brune, Jr.

Michigan Law Review, January (Ann Arbor, Mich.)—Recent Developments in the Deportation Process, by Reuben Oppenheimer; The Effect of the Contract Clause and the Fourteenth Amendment Upon the Power of the States to Control Municipal Corporations, by E. B. Schulz; Expansion of Federal Supervision of Securities Through the Inquisitional and Census Powers of Congress—A Suggestion, by Kenneth Rush.

Minnesota Law Review, January (Minneapolis, Minn.)—The Alien's Right to Work, by David Fellman; Common Law Marriage in Minnesota: A Problem in Social Security, by Thomas Clifford Billig and James Phillip Lynch; A Plea for Withdrawal of Constitutional Privilege from the Criminal, by Ernest C. Carman.

Mississippi Law Journal, December (University, Miss.)—The Courts and Due Process of Law, by Sydney Smith; Opinions of the Securities and Exchange Commission, by David Loeb Krupsaw.

New York University Law Quarterly Review, November (New York City)—Taxation of Undistributed Profits, by Paul Marcuse; Changes in the 1920 Revision of the New York Decedent Estate Law, by Frank H. Twyeffort; The Implications of the Kellogg Pact with Respect to American Foreign Policy, by Clarence A. Berdahl.

Oregon Law Review, December (Eugene, Ore.)—The Oregon State Bar—Its Program and Accomplishments, by Allan A. Smith; The Executive and Judiciary in Continental Europe, by Paul Weidenbaum; Some Fundamentals in Our Democratic System of Government, by Joseph C. O'Mahoney.

University of Pennsylvania Law Review, January (Philadelphia, Pa.)—Monopolies and the Courts, by Robert H. Jackson and Edward Dumbauld; Some Suggestions for Defining and Classifying Hearsay, by Edmund M. Morgan; The Role of the Federal Government in the Conservation and Utilization of Water Resources, by James Lawrence Fly.

Virginia Law Review, January (Charlottesville, Va.)—Equal Protection in Tax Legislation, by John B. Sholley; Custom in Classical Roman Law, by A. Arthur Schiller; Forged or Omitted Signature of Principal or Co-Surety—Part II, by Morton C. Campbell and Robert M. Campbell.

Washington Law Review, November (Seattle, Wash.)—Presumptions, by Edmund M. Morgan; Defamation and Radio, by Donald G. Graham.

Wisconsin Law Review, January (Madison, Wis.)—Law Faculties and Law Schools. A Comparison of Legal Education in the United States and Germany, by Max Rheinstein; The Work of the Wisconsin Supreme Court for the August 1936 and January 1937 Terms: I. Statistical Survey, by Hilbert P. Zarky; II. Banking and Negotiable Instruments, by Joseph P. Brazy; III. Business Associations, by Malcolm K. Whyte; IV. Contracts and Quasi Contracts, by Edwin Conrad; V. Criminal Law, by Elliot N. Walstead; VI. Employment, by William W. Rabinovitz; VII. Evidence, by Marcus A. Jacobson; VIII. Insurance, by Russell E. Hanson; IX. Municipal Corporations, by Doris E. Lehner; X. Personal Property, by Willard Hurst; XI. Persons and Domestic Relations, by Eleanore Jones Roe; XII. Pleading, Practice and Procedure, by W. Wade Boardman; XIII. Real Property, Mortgages, and Vendor and Purchaser, by Ralph M. Hoyt; XIV. Remedies, by Maxwell H. Herriott; XV. Taxation, by Ernst von Briesen; XVI. Torts, by Arthur T. Thorson; XVII. Trusts and Decedents' Estates, by Miriam L. Frye.

Yale Law Journal, January (New Haven, Conn.)—Psychiatry and the Conditioning of Criminal Justice, by George H. Dession; Secondary Boycotts in Labor Disputes, by Jerome R. Hellerstein; The "Conspiracy Theory" of the Fourteenth Amendment, by Howard J. Graham.

OLIVER WENDELL HOLMES: LAWYER

His Judicial Career Looms So Large That the First Twenty Years of His Life after Attaining His Majority Have Almost Been Forgotten—It Is of Paramount Importance to Study His Career at the Bar in Order to Estimate and Understand the Judicial Career Which Followed—Early Doubts—Preparation for Practice in the "Grand Way"—Extent of Practice Indicated in a Way by Cases in Which Questions of Law Were Argued on Appeal before Supreme Judicial Court Sitting in Banc—Tribute to Mr. Shattuck—The Boston Bar in His Day—Lectures at Harvard, etc.

By Harry C. Shriver
Member of Staff of the Law Library of Congress

THE late Justice Holmes is regarded by many as the most scholarly and able jurist whom America has yet produced. On the continent of Europe he is known primarily for his early speculative writings on the Anglo-American law; to the English his reputation reposes on his *Common Law* and his judicial career as a common law judge of the Supreme Judicial Court of Massachusetts. To the American, he is known for all these things, but also as a Supreme Court justice, a statesman, and for his interests outside the field of law.

His judicial career of nearly fifty years looms so large in the minds of his biographers and commentators on his work, that the first twenty years of his life after attaining his majority have been almost forgotten. It is during the second twenty years of nearly every life in which a man takes his direction. The particular channel which his life takes, the degree of ability and energy shown during these years measure the ultimate distance. This fact is particularly true of the late Justice Holmes. It is therefore of paramount importance to study his career at the bar in order to estimate and properly understand his judicial career which followed.

What Holmes' career would have been had he not served in the Civil War is difficult to say. In reading his isolated papers and speeches one gleans the impression that he obtained a rich spiritual tone from his war experiences. It must be evident that these experiences hastened his maturity, so that on his return from the battlefield we see more of the cold steel in his make-up and he experienced no lost motion in finding himself. At the battlefront he witnessed his friends here today and gone tomorrow. As he so dramatically related years afterwards:

"I see a fair haired lad—a lieutenant—and a captain, sitting by the long mess-table in camp before the regiment left the State, and wondering how many of those who gathered in our tent could hope to see the end of what was then beginning. FOR NEITHER OF THEM WAS THAT DESTINY RESERVED. . . I see another youthful lieutenant as I saw him in the Seven Days, when I looked down the line at Glendale. . . . The advance was beginning, we caught each other's eye and saluted. When next I looked, HE WAS GONE."[1]

Chance determined which ones were to be the victims. He learned that "society is founded on the death of men. In one way or another some are always and inevitably pushed down the dead line."[2] And man's contribution must be made before that event takes place.

Many of our Supreme Court justices have had no previous judicial experience prior to their appointment. It is frequently claimed that many years of practice at the bar, a large commercial practice, or previous tenure of office in the government and accomplishments in public affairs, constitute the necessary qualifications for an appointment to the Supreme Court. It is claimed that these varied attainments best fit a man to grapple with the manifold problems which come before the court. To all this, it has been said, Justice Holmes was the great exception. For the greater part, this is true. As we shall see presently, even during the period when his law practice was at its height, Holmes spent a vast amount of his time in research and writing.

In his early years Holmes had some doubts in his mind whether he wished to pursue the study of philosophy or embrace the profession of law as a career. Happily for the law, by his choice he left philosophy for his boyhood friend, William James, and in turn enriched the legal world by his researches and opinions. This choice he made definitely and finally in the summer of 1864. On July 17 of that year, at the end of his enlistment, he was mustered out of the Union Army and in September entered Dane [Harvard] Law School. He completed the regular two-year course and was graduated on July 18, 1866, receiving the degree of LL.B. In addition to his work at the law school he pursued his legal studies in the law office of Honorable Robert M. Morse, Barrister's Hall, Boston, which he entered in December, 1864. After having completed his preparation for the legal profession he visited Europe during the summer of 1866. Here, he met several distinguished Englishmen; and later made the acquaintance of others who subsequently became outstanding jurists, including: Leslie Stephen, Frederick Pollock, Frederick Maitland, Henry Maine, Haldane, Sidney Webb, James Bryce, Joseph Chamberlain, Sankey, Alverstone, Bowen, and Albert Venn Dicy. But Holmes' trip abroad was only a brief respite from his studies. Perhaps, it gave him an opportunity to discuss many of his philosophical ideas of the law with

1. See, *Speeches* (Holmes), Little, Brown and Company (1913), p. 5, 6.

2. See, Letter of Justice Holmes to Dr. Wu, reprinted in *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers.* Edited by Harry C. Shriver. Central Book Company, New York (1936), p. 181.

Mr. Pollock, who was later to dominate English legal thought in much the same fashion as Holmes did the American. On his return to the United States he continued his studies in the law offices of Messrs. Chandler, Shattuck, and Thayer, at 4 Court Street in the city of Boston; was admitted to the Suffolk bar on March 4, 1867; and subsequently before the Supreme Court of the United States. At first he went into partnership with his brother, Edward Jackson Holmes, at 7 Pemberton Square, Boston; later in 1873 he practiced with the firm of Shattuck, Holmes, and Munroe, at 35 Court Square.

Admission to the bar, however, was not considered an adequate preparation by young Holmes for the practice of law, "at least in a grand way." It was not a part of his make-up to sit by idly and wait for clients. He must know the law in all its ramifications; he must find out its fundamental concepts, its history and nature, its philosophical underpinning, and in addition be familiar with the fields of knowledge related to it! He sought, therefore, not only to master the mechanics of the practice of law and its details, but also set for himself the task of investigating its ancient and time-honored doctrines. As a boy he was intimately acquainted with Ralph Waldo Emerson. Holmes studied the great works of philosophy, and during these early years he often wrangled for hours in his garret about the "cosmos" with his friend William James. Why, he asked himself, could the law not furnish as great a field for investigation and original search for truth as philosophy or psychology? Is there not room in the law for the study of the "embryology of legal ideas?" Does the law consist merely of a ragbag of details, of cases and reports of interest only to the practitioner, or does it mirror the growth of man? To the well-settled doctrines of the law, Mr. Holmes applied a philosophical and scientific criticism.

It is small wonder then that with such ideals he should plunge headlong into the study of law. On December 15, 1867, he wrote to William James, who then sojourned in Germany, "For two or three months I debauched o'nights in philosophy. But now it is law—law—law."[3] And on April 19, 1868, he wrote, 'And the winter has been a success, I think, both for the simple discipline of the work and because I now go on with an ever increasing conviction that law as well as any other series of facts in this world may be approached in the interests of science and may be studied, yes and practiced, with the preservation of one's ideals."[4] Holmes' devotion to his studies during these early years was almost terrifying to his friends. James remarked on one occasion in 1869 in a letter to Henry Bowditch, a classmate of Holmes, "I should think Wendell worked too hard."[5] Later from another by a member of the James family we get the same impression. "Wendell Holmes dined with us a few days ago. His whole life, soul and body, is utterly absorbed in his *last* work upon his Kent. He carries about his manuscript in his green bag and never loses sight of it for a moment. He started to go to Will's room to wash his hands, but came back for his bag, and when we went to dinner, Will said, 'Don't you want to take your bag with you?' He said, 'Yes, I always do so at home.' His pallid face, and this fearful grip upon his work, makes him a melancholy sight."[6] This was in 1873.

Something of his industry and meticulous accuracy may be seen in the following passage from the preface to the twelfth edition of Kent's, *Commentaries on American Law*, which he edited in 1873:

> I have devoted more than three years to the attempt to bring this work down through the quarter of a century which has elapsed since the author's death. While it has been in progress I have tried to keep the various subjects before my mind, so far as to see the bearing upon them of any new decision in this country or in England. Almost all of my more important notes have been partially or wholly rewritten—many of them more than once—in the light of cases which have appeared since their first preparation; and every case cited has been carefully examined in the original report. . .

Unlike many young lawyers of his day, young Holmes seems never to have had any flare for politics or elective office while he was at the bar. Many lawyers think it a *sine qua non* to success at the bar to be elected district attorney, a member of the state legislature, or to hold some other public office. But this was not true of Mr. Holmes. He held no public office while he practiced law. Doubtless, the life and demands of politics were quite distasteful to his fine-grained and scholarly temperament. He cared nothing for the backslapping of politics nor for the clamor of the crowd. He believed that the great changes in the world were brought about by the efforts of the scholar and the philosopher rather than the general in the field of battle or the man of affairs. As he said years later, "Read the works of the great German jurists, and see how much more the world is governed today by Kant than by Bonaparte."[7] It was only natural, therefore, that Holmes should choose the difficult road to success at the bar, that is, he would try each case so as "to show in it the great line of the universal"; and use his spare hours in teaching, research, and writing, so that success as he saw could be achieved.

But attainment of success before the distinguished Suffolk bar was not an easy task during the sixties and seventies. Success did not come over night. To be sure Holmes tried a few cases before the Probate Court, the Superior Court, and the Supreme Judicial Court sitting in *nisi prius*,[8] while practicing with his brother and many more after his association with the law firm of Shattuck, Holmes and Munroe in 1873. The cases in which questions of law were argued on appeal before the Supreme Judicial Court *in banc* indicate in a way the extent of his practice. An examination of the Massachusetts reports for the years 1867 to 1870 reveal that Holmes was on the briefs as counsel in but three cases. He was the junior counsel with George O. Shattuck in one case heard in the November term in 1867; another at the March term 1870; and first appeared alone as a counsel in a case before the court during the November term 1870. During all his fifteen years at the bar including three years as editor

3. See, Perry, Ralph Barton. *Thought and Character of William James.* Little, Brown and Company (Boston, 1935), p. 505.

4. See, ibid., p. 510.

5. See, James, Henry (ed.). *Letters of William James.* Little, Brown and Company (Boston, 1920), vol. 1, pp. 154-5.

6. Perry. *Thought and Character of William James.* p. 519.

7. See, *Path of the Law.* 10 Harv. Law Rev. 478 (March, 1897); *Collected Legal Papers* (Holmes) p. 202.

8. The Supreme Judicial Court of Massachusetts had jurisdiction among other things, to hear cases on questions of law on exceptions and appeals from the lower courts (General Statutes, 1860, c. 112, Sec. 5); original civil jurisdiction in cases of one thousand dollars or more—four thousand dollars in the county of Suffolk—(Gen. Sts., c. 112, Sec. 6); and jurisdiction of trials of indictments for capital crimes (Gen. Sts., c. 112, Sec. 5). Jurisdiction to try tort cases was transferred to the Superior Court in 1880; and capital cases in 1891 (Acts and Res., 1880, c. 28; and 1891, c. 379, Sec. 1).

of the American Law Review he was associated as counsel in thirty-four cases argued *in banc* before the Supreme Judicial Court. Out of this number, he appeared alone in nine cases, was senior counsel in twelve, and was associated with other attorneys in the remainder of the thirty-four cases.[8a]

None of these cases involved questions of criminal law, and in only one case a question of constitutional law was presented. This was raised by Shattuck and Holmes, but was overruled.[9] These cases related to general civil practice, presenting questions in equity, contracts, torts, sales, mortgages, admiralty, partnership, bankruptcy, promissory notes, suretyship, real property, condemnation, assessments, and procedure. Very few of them involved large sums of money. It is significant, in view of the influence of his writings on the law of torts, that the cases which he argued before the Sureme Judicial Court concerned questions of torts more than any other subjects.

The first case in which Mr. Holmes was associated as counsel and which was argued on appeal was that of Richardson v. New York Central Railroad,[10] heard at the November term 1867. Mr. George O. Shattuck and O. W. Holmes, Jr., appeared for the plaintiff. It was a suit in tort for $5,000, for personal injuries by reason of the death of plaintiff's intestate while a passenger on defendant's road in New York. Suit was brought alleging a cause of action under a New York death by wrongful-act statute, claiming that the New York statute "vested a right of property in the widow and her children at the moment of the husband's death, and designated a trustee to receive and enforce this right, whose capacity to sue will be sustained in any forum." No analogous statute existed in Massachusetts. The defendant demurred on the ground that the right of action created by the New York statute does not pass as assets of the deceased, but as a specific power to sue created by local law. Judge Hoar who delivered the opinion of the Court characterized the argument of the plaintiffs counsel as ingenious and impressive but sustained the demurrer.

The first case in which Mr. Holmes appeared alone before this court, he won. It was a suit in tort for the obstruction of an easement. It was argued in the November term 1870.[11]

In reading the reports of these cases with which Mr. Holmes was associated, one is apt to come to the conclusion that he was not deterred if the law appeared to be well settled and if it was not on his side of the case. His study of the philosophy of law, of legal theory, and legal history which he made during these same years, doubtless impressed him with the notion that somewhere along the line in the growth of the law, decisions might be determined by misconceptions,[12] a mistranslation of the ancient authorities,[13] or by a public policy of previous generations which has long since been forgotten.[14] For this reason it is not surprising to find him delving into the earliest American and English precedents or to endeavor to trace the history of doctrines in an effort to find authority for his case. If need be, resort was made to the Civil Law and Justinian's Digest. This he did in a case which he argued before the Supreme Judicial Court at the September Term in 1877.[15] In this case a seaman proved that he shipped at a fixed rate of wages per month on a vessel of which defendant was at the time master and that he served until discharged by him. The question in issue was whether the seaman should recover against the master of the vessel for his wages. Holmes' argument as reported follows in full:

> The contract under which the plaintiff in each case shipped appears to have been express, in the strictest sense, but there is no evidence as to who made it or what were its terms, and the question is whether the plaintiff has supported the burden of proving a contract personally binding the defendant, by evidence tending to show no more than that the defendant was master of the vessel. In general, to charge an agent or servant upon a contract made by the authority and for the benefit of a principal or master, it must appear that the servant made the contract, and that, if the contract was in writing, it contained apt words to charge him, or, if it was oral, that the language used authorized the credit to be given to him, and that credit was so given. An agent or servant is only charged on a contract on behalf of another on the ground that he has made it his contract. The same principles apply to the case of the master of a vessel, with regard to services performed on board a ship commanded by him. If he is charged, it is because he is shown to have made a contract, and has made it in such form that it is his contract, on one of the grounds just stated. Goodridge v. Lord, 10 Mass. 483, 486, 487. James v. Bixby, 11 Mass. 34, 37. Hoskins v. Slayton, Cas. temp. Hardwicke, 376. Garnham v. Bennett, Stra. 816. Rich v. Coe, Cowp. 636, 639. Farmer v. Davies, 1 T. R. 108. Hussey v. Christie, 9 East, 426, 432. Priestly v. Fernie, 3 H. & C. 977, 984-986.
>
> Especially must this be true when the contract is expressed in words, oral or written. This appears here, for the evidence is that the plaintiff shipped at a specified rate of wages, which could not otherwise have been the case. That contract not being in evidence, *non constat* who made the special promise; and if the service is rendered "on a special promise from either, the other is discharged." Garnham v. Bennett, *ubi supra*. Nor does it appear whether it was in writing or oral, and whether, therefore, if made by an agent, it showed an intention to charge him, as a matter of construction or on the ground that credit was given to him.
>
> The obscurity which has surrounded this class of questions arises from the fact that admiralty law has been a compound of doctrines springing from various systems at various stages of society, and cannot be understood except by the aid of history, which will also help to rid it of its incongruities. Modern authorities properly reduce the relation of shipmaster and owners to an ordinary case of agency; but the law of agency, as now understood, is for the most part modern. It was an exception and a comparatively late innovation in the Roman law. *Mandatum* was not agency. A master might be liable for his slave, but not one *paterfamilias* for the act of another. A free citizen *sui juris* was liable for his own acts if anybody was. On special grounds of policy, the praetor allowed the master of a ship, of whatever condition, to impose a liability on the owner in certain cases. D. 14, 1, 1, Sec. 4. But the fiction by which one freeman is wholly absorbed under the *persona* of another was not then developed, and the liability of the person actually making the contract, which was the only liability known to the old law, remained, notwithstanding the secondary responsibility which was added to it. The mediaeval maritime law showed a

8a. See, Appendix.

9. See, Nickerson v. Boston, 131 Mass. 306 (1881).

10. See, 98 Mass. 85.

11. See, Brooks v. Reynolds, 106 Mass. 31.

12. See, *Misunderstandings of the Civil Law.* 6 Am. Law Rev. 37-49 (October, 1871).

13. id., p. 40, n. 2; *Arrangement of the Law-Privity.* 7 Am. Law Rev. 46 (October, 1872) at p. 55, n. 1.

14. A few years later in 1879, he said, "But as precedents survive like the clavicle in the cat, long after the use they once served is at an end, and the reason for them has been forgotten, the result of following them must often be failure and confusion from the merely logical point of view." See, *Common Carriers and the Common Law.* 13 Am. Law Rev. (July, 1879) at p. 630.

15. Temple v. Turner, 123 Mass. 125.

further development. The master could bind the ship, although on modern principles he was in no sense the agent of the owners to whom the ship belonged. Traces of this doctrine still remain, indeed, in the admiralty law, although it is disappearing. But at that time he could not bind the owners personally. Now, however, the conception of agency has been developed, and the master can bind the owners on the one hand, while, on the other, the liability of the ship in most cases, and that of the owners in all, is determined by considering what actual or seeming authority the master had to represent them. But it is part of the law of agency that a man may make himself a mere conduit pipe, through which a contract moves from his principal. And, as the responsibility of the superior is wholly determined by that law, it is supposed that the same is true of the inferior, as laid down in Priestly v. Fernie, already cited.

In the present case, it does not appear that the defendant was even on board the ship when the plaintiff made his contract, or had anything to do with engaging the plaintiff. If he did not personally make the contract, the only possible foundation for charging him disappears. Farmer v. Davies, 1 T. R. 108.

Chief Justice Gray set aside the verdict ordered for the defendants on the ground that an express contract existed between the master and the seaman. The latter, he held, has a threefold remedy for his wages, against the master, the owner, or the ship, and may proceed, at his election, against either of the three in the admiralty, or against the master or the owner at common law.

During the years in which Holmes practiced law before the Suffolk bar, the city of Boston could boast of having a group of the most able lawyers in the United States. Such men as Sidney Bartlett, Daniel Richardson, James T. Austin, Charles G. Loring, Richard H. Dana, Gustavus A. Somerby, Peleg Whitman Chandler, and a host of others, great in their day but whose names are meaningless to the present generation, were then the leaders at the bar. On the bench were such men as George T. Bigelow, Reubin A. Chapman, Horace Gray, Marcus Morton, Ebenezer R. Hoar, Otis P. Lord, Walbridge H. Field, Charles Devens, and William Allen. Among the younger members of the bar or associates of Mr. Holmes on the faculty of the Harvard Law School were, Nicholas St. John Green, John C. Gray, Christopher Langdell, James B. Thayer, James Barr Ames, Moorfield Storey, and Louis D. Brandeis.

Henry Parkman and Joseph Warner assisted Holmes in the preparation and editing of the twelfth edition of Kent's Commentaries on American Law, which was published in 1873. A few years later, Mr. Louis D. Brandeis was admitted to practice before the Suffolk bar, and Holmes soon came to regard him very highly. During the last few years of Holmes' practice, he would now and then send a modest note to young Brandeis requesting his company in the evenings for the purpose of discussing some of the theoretical aspects of the law of torts.[16] Holmes would read to him his notes of "dijecta membra" as he called them and then discuss them with the view of determining whether they were ready for publication.[17] As the years went on they became bosom friends. Mr. Brandeis practiced his profession in Boston, often pleading cases before Holmes, then judge on the Supreme Judicial Court, hardly anticipating that later they were to sit together for nearly twenty years as associate justices of the Supreme Court of the United States.

Like every lawyer, Holmes was influenced by the bench and bar of his day, and particularly as to the practical aspects of the law. Those with whom he came in daily contact influenced him most. As he stated in later years, his first steps were made more easy by his devoted friend, Mr. Shattuck, with whom he was associated during most of the years of his practice. On May 29, 1897, in answer to the resolutions of the bar, he paid a glowing tribute and expressed his manifold obligations to his departed friend in the following language:

I owe Mr. Shattuck more than I ever have owed any one else in the world, outside my immediate family. From the time when I was a student in his office until he died, he was my dear and intimate friend. He taught me unrepeatable lessons. He did me unnumbered kindnesses. To live while still young in daily contact with his sweeping, all-compelling force, his might of temperament, his swiftness (rarely found with such might), his insight, tact, and subtlety, was to receive an imprint never to be effaced. My education would have been but a thin and poor thing had I missed that great experience. The things he did for me in other practical ways even gratitude cannot enumerate or remember. It seemed to me that he could not find any one near him without interesting himself in his fortunes and his fate. . . .

He needed the excitement of advocacy or of some practical end to awaken his insight, but when it was awakened there was no depth of speculation or research which he was not ready and more than able to sound. His work may not always have had the neatness of smaller minds, but it brought our deeply hidden truths by some invisible radiance that searched things to their bones.

He seemed to like to take great burdens upon himself,—not merely when there was a corresponding reward, but when his feelings were touched, as well. He was a model in his bearing with clients. How often have I seen men come to him borne down by troubles which they found too great to support, and depart with light step, having left their weight upon stronger shoulders. But while his calm manner made such things seem trifles, he took them a good deal on his nerves. I saw the ends of his fingers twitch as he quietly listened and advised. He never shunned anxiety, and anxiety is what kills. . . .

At the time to which I refer, when I first knew him, and while he still tried many cases, he was a great man with the jury in every way. His addresses carried everything before them like a victorious cavalry charge, sometimes, as it seemed to me, sweeping the judge along with the rest in the rout. Latterly his most successful appearances were in arguments of law. He had learned the all too rarely learned lesson of pointed brevity. In a few luminous words he went to the bottom of his question, and then took his seat. In short, I know of no form of forensic effort in which at some time in his career he had not reached as high a point as I personally have ever seen attained.[18]

This is, however, but part of the story of Mr. Holmes' practice of law. Not all his efforts were devoted to law suits. As we have seen, in his school days his preoccupation was the study of philosophy and social institutions. And while during his later years he never found time sufficient to study philosophy systematically, he retained this interest while practicing law and indeed throughout his whole life. After completing his formal studies and entering practice, the emphasis was somewhat shifted. He wanted to know what part philosophy played in the development of the

16. Louis D. Brandeis was admitted to the bar in 1878. This discussion, doubtless, was preliminary to the publication of Holmes' articles in the American Law Review relating to *Common Carriers*, and *Trespass and Negligence*, which appeared in 1879 and 1880.

17. Lief, Alfred. *Brandeis, The Personal History of an American Ideal.* New York (1936) p. 25.

18. See, *Speeches*, pp. 70-72.

law. He investigated the history of law, its juridical basis, and philosophical background. As a result of his studies there appeared in the American Law Review for October, 1870, his first essay entitled, *Codes, and The Arrangement of the Law.* During the next three years he had editorial charge of this journal (1870-73), contributing five additional articles and approximately sixty book reviews and editorial comments[19] in addition to editing Kent's Commentaries. In 1873, Mr. Holmes relinquished the editorship of this journal and entered the law firm with George O. Shattuck and W. A. Munroe. Three years later, in 1876, he again contributed an article to this journal under the title, *Primitive Notions in Modern Law.* In the four succeeding years, he wrote an article each year for the same journal.[20] Taken together they present a systematic scheme investigating the fundamental conceptions of the common law. In the Winter of 1880, on the basis of his articles in the American Law Review, he delivered a series of lectures before the Lowell Institute in Boston, which were later published in 1881, under the title the *Common Law.* Regarding these lectures it has been said by an eye witness that Mr. Holmes delivered them, "without referring to his manuscript, as if he were narrating off-hand some interesting story, or telling of the happening of some event of absorbing interest. Probably very few of the audience were able to comprehend the abstruse reasoning of the lectures, though the lecturer or his manner of speech attracted them to the end. The manner of delivery of these lectures seemed then, as it does now, a marvelous intellectual performance, for the delivery of them was not a matter of memory so much as a process of reasoning at the moment, by a mind thoroughly imbued with the subject."[21] This book though never revised has remained a classic until the present day.

During the term 1871-72, Holmes lectured on Jurisprudence in the Harvard Law School. On September 24, 1872, he was again appointed to give lectures on the same subject, which he did during the term of 1872-73. From 1872 to 1878 he was one of the overseers of Harvard College. In 1882, he again returned to the law school, upon the creation of the new chair later known as the "Wield Professorship," and taught the subjects of torts, suretyship, mortgages, jurisprudence, and agency and carriers.

Today, if one examines the official Massachusetts Reports he encounters this brief Memorandum which marks the beginning of a long judicial career unmatched perhaps in length or brilliancy either here or abroad:

On the fifteenth day of December 1882, Oliver Wendell Holmes, Jr., Esquire, of Boston, was appointed a justice of this court, in place of Mr. Justice Lord, resigned, and took his seat on the bench on the third day of January 1883, at the term of the court then held at Boston in the county of Suffolk.[22]

Governor Long's appointment of Holmes turned out to be a wise one. Harvard University and its faculty regretted losing him. The loss to the university was the gain of the judiciary of Massachusetts and of the United States as well as the law in general. This appointment brought to an end Mr. Holmes' career both as a lawyer and teacher, at least in a formal sense. For decades afterwards, his writings and speeches and particularly his *Common Law* influenced and pointed the way for American legal scholars and law teachers. On the bench he had a new client. Here, on the one hand he remolded and refashioned the law to meet the new and changing conceptions of our industrial society so far as that was possible within the judicial prerogative and function. On the other hand, he interpreted and applied the law so as to permit it to grow. He transcended his own convictions so as to uphold legislation with which he disagreed, so as to leave room for orderly change of the law rather than make it the slave of some particular ethical or economic opinion.

These few brief facts concerning the late Justice Holmes' career as a practicing lawyer reveal that his practice was not extensive. He was not a great commercial lawyer, nor did he hold public office prior to his judicial career. His years at the bar were sufficient, however, to give him an opportunity to grasp the actualities of law practice and become entirely familiar with its problems. His education and professional training was the best that was obtainable in America in his day. His insight and great penetration of thought applied to research in jurisprudence and our judicial system, gave him a background and training unmatched for his later judicial duties.

APPENDIX

List of Cases Argued Before the Supreme Judicial Court of Massachusetts *in banc* in which O. W. Holmes, Jr., appeared as counsel.

Richardson v. New York Central Railroad Co., 98 Mass. 85, G. O. Shattuck and O. W. Holmes, Jr., for Plaintiff—November Term, 1867.

Young v. City of Boston, 104 Mass. 95, G. O. Shattuck and O. W. Holmes, Jr., for Plaintiff—March Term, 1870.

Brooks v. Reynolds, 106 Mass. 31, O. W. Holmes, Jr., for Plaintiff—November Term, 1870.

Commonwealth v. Dorchester Insurance So., 112 Mass. 142, G. O. Shattuck and O. W. Holmes, Jr., for Defendant—March Term, 1873.

Joy v. Winnisimmet Company, 114 Mass. 63, G. O. Shattuck and O. W. Holmes, Jr., for Defendant—November Term, 1873.

Burt v. Merchants' Insurance Co., 115 Mass. 1, B. F. Brooks and G. O. Shattuck (O. W. Holmes, Jr., and M. Storey) with them for receivers of Merchants' Insurance Co.—March Term, 1874.

Woodward v. Boston, 115 Mass. 81, O. W. Holmes, Jr., and E. J. Holmes for Plaintiffs—April Term, 1874.

Jenks v. Williams, 115 Mass. 217, O. W. Holmes, Jr., and W. A. Munroe for Defendants—June Term, 1874.

National Bank of Chicago v. Bagley, 115 Mass. 228, G. O. Shattuck and O. W. Holmes, Jr., for Defendant—June Term, 1874.

Children's Mission v. Boston, 116 Mass. 181, O. W. Holmes, Jr., and R. Gray for Plaintiff—October Term, 1874.

Tapley v. Martin, 116 Mass. 275, G. O. Shattuck and O. W. Holmes, Jr., for Plaintiffs—November Term, 1874.

West v. Platt, 116 Mass. 308, O. W. Holmes, Jr., for Plaintiff—November Term, 1874.

Boston and Hingham Steamboat Co. v. Munson, 117 Mass. 34, G. O. Shattuck and O. W. Holmes, Jr., for Defendant—January Term, 1875.

19. These unsigned book notices and comments were first identified by Professor Felix Frankfurter. See, 44 Harv. Law Rev. 797-8 (1931). All of them were recently reprinted in *Justice Oliver Wendell Holmes; His Book Notices and Uncollected Letters and Papers.* Mr. Holmes' unsigned articles written while he was editor of this journal consist of the following: *Codes and the Arrangement of the Law.* 5 Am. Law Rev. 1-13, October, 1870; *Ultra Vires: How Far Are Corporations Liable for Acts Not Authorized by Their Charters?* 5 Am. Law Rev. 272-90, January, 1871; *Misunderstandings of the Civil Law.* 6 Am. Law Rev. 37-49, October, 1871; *Grain Elevators: On the Title to Grain in Public Warehouses.* 6 Am. Law Rev. 450-70, April, 1872; *The Arrangement of the Law: Privity.* 7 Am. Law Rev. 46-66, October, 1872; *The Theory of Torts.* 7 Am. Law 652-63, July, 1873.

20. His signed articles include: *Primitive Notions in Modern Law.* 10 Am. Law Rev. 422-39, April, 1876; *Primitive Notions in Modern Law,* Part 2. 11 Am. Law Rev. 641-60, July, 1877; *Possession.* 12 Am. Law Rev. 688-720, July, 1878; *Common Carriers and the Common Law.* 13 Am. Law 609-31, July, 1879; and, *Trespass and Negligence.* 14 Am. Law Rev. 1-35, January, 1880.

21. See, Jones, Leonard A. *Oliver Wendell Holmes, the Jurist.* 36 Am. Law Rev. 710 (1902) at p. 713.

22. See, 134 Mass 1.

Hill v. Winsor, 118 Mass. 251, O. W. Holmes, Jr., and W. A. Munroe for Defendant—September Term, 1875.

Whitcomb v. Converse, 119 Mass. 38, G. O. Shattuck and O. W. Holmes, Jr., for Defendant—October Term, 1875.

Martin v. Tapley, 119 Mass. 116, O. W. Holmes, Jr., for Respondent—November Term, 1875.

Connecticut Trust Co. v. Melendy, 119 Mass. 449, G. O. Shattuck and O. W. Holmes, Jr., for Plaintiff—January Term, 1876.

Funcheon v. Harvey, 119 Mass. 469, O. W. Holmes, Jr., and W. A. Munroe for Plaintiff—January Term, 1876.

West v. Platt, 120 Mass. 421, O. W. Holmes, Jr., and W. A. Munroe for Plaintiff—June Term, 1876.

Hyannis Savings Bank v. Moors, 120 Mass. 459, G. O. Shattuck and O. W. Holmes, Jr., for Defendant—June Term, 1876.

Barnstable Savings Bank v. Moors, 120 Mass. 459, G. O. Shattuck and O. W. Holmes, Jr., for Defendant—June Term, 1876.

Commonwealth v. Mechanics' Insurance Co., 120 Mass. 495, O. W. Holmes, Jr., for the Petitioner—September Term, 1876.

Arvilla v. Spaulding, 121 Mass. 505, O. W. Holmes, Jr., for Respondents—January Term, 1877.

Tapley v. Goodsell, 122 Mass. 176, O. W. Holmes, Jr. (G. O. Shattuck with him) for Plaintiff—March Term, 1877.

Treadwell v. Boston, 123 Mass. 23, G. O. Shattuck (O. W. Holmes, Jr., with him) for Petitioner—June Term, 1877.

Temple v. Turner, 123 Mass. 125, O. W. Holmes, Jr., for Defendant—September Term, 1877.

West v. Platt, 124 Mass. 353, O. W. Holmes, Jr., and W. A. Munroe for Plaintiff—April Term, 1878.

Platt v. Justices of the Superior Court, 124 Mass. 353, O. W. Holmes, Jr., and W. A. Munroe for Respondents—April Term, 1878.

West v. Platt, 127 Mass. 367, O. W. Holmes, Jr., and W. A. Munroe for Plaintiff—September Term, 1879.

Moors v. Albro, 129 Mass. 9, O. W. Holmes, Jr., for Plaintiff—June Term, 1880.

Sherwin v. Wigglesworth, 129 Mass. 64, O. W. Holmes, Jr., for Defendants—June Term, 1880.

McKim v. Bartlett, 129 Mass. 226, O. W. Holmes, Jr., and W. A. Munroe for Defendant—August Term, 1880.

Sturges v. Theological Education Society, 130 Mass. 414, O. W. Holmes, Jr., for Defendant—February Term, 1881.

Nickerson v. Boston, 131 Mass. 307, O. W. Holmes, Jr., and W. A. Munroe for Petitioner—June Term, 1881.

MUNICIPAL LIABILITY FOR PATENT INFRINGEMENT

Infringements by Separately Incorporated Municipal Boards or Departments—Liability of Municipal Contractors and Sureties—Decree Against Municipality—Liability of County Boards—Authorities Admonish These Bodies to Be Careful not to Trespass on Patent Rights and to Refrain from Active Participation in Defense of Any Infringement Suit in Which They Are not Defendants.

BY HARRY SOMMERS
Member of Newark, New Jersey Bar; Patent Attorney

THE expansion of municipal building programs has brought to the fore the question of municipal liability for patent infringement.

The act of infringement is a tort for which a municipality is liable just as any other infringer. United States v. City of New York, 12 F. Supp, 169, 173; Akron v. Bone, 221 F. 944; Munson v. City of New York, 3 F. 338, reversed on another ground in 8 S. Ct. 622, 124 U. S. 601.

Municipalities are liable jointly with their contractors, for (a) the amount saved in paying the contractor below what would have been paid the licensee, and (b) the damages based on a reasonable royalty on the work done. Reliance Const. Co. v. Hassam Paving Co., 248 F. 701; Elizabeth v. Pavement Co., 97 U. S. 126. It is immaterial whether the municipality contracted for or required the use of an article made by an infringing machine; it is sufficient if it accepts the article or allows the contractor to use it, without license of the patentee. Asbestine Tiling & Mfg. Co. v. Hepp, 39 F. 324. A municipality is liable for contributory infringement. American Voting Machine Corp. v. City of New York, 2 F. Supp. 191. Where infringement by the municipality is wilful and deliberate, treble damages may be awarded. Wallace & Tiernan Co. v. City of Syracuse, 4 U. S. Pat. Q. 112, 36 F. (2) 497, affirmed as to this point but reversed on other grounds in 8 U. S. Pat. Q. 80, 45 F. (2) 693.

State legislation exempting municipalities from liability and making their agents liable instead, has been held ineffective, for infringement is governed by federal laws which cannot be abrogated by the states. Bliss v. Brooklyn, 3 Fed. Cas. No. 1544; Akron v. Bone, 221 F. 944; Allen v. Brooklyn, 1 Fed. Cas. No. 218.

Infringement by Separately Incorporated Municipal Boards or Departments

A municipality is liable for infringement committed by its separately incorporated board of education or fire department, for "If any party has saved, or made anything by this infringement, it is the city, and the city seems clearly to be a proper party to account for these savings or profits. The board and department are proper parties, also, for they have been directly engaged in the infringement." Allen v. New York, 1 Fed. Cas. No. 232. To the same effect: Brickell v. New York, 7 F. 479 and Ransom v. New York, 20 Fed. Cas. No. 11,573. Contra: Allen v. Brooklyn, 1 Fed. Cas. No. 218. The patentee may sue the board

and municipality jointly or severally; if he adopts the latter course, each action will be treated as independent and if the pleadings in the first action are recited in the second, the recital will be treated as surplusage. Sewerage Commission v. Activated Sludge, 69 F. (2) 594. But where the defense of a suit against a municipality was conducted by the law department of a separately incorporated (sewerage) commission, a decree against the municipality, though interlocutory, was held to be res adjudicata as to the sewerage commission in a subsequent suit against the sewerage commission on the same patent. The sewerage commission was precluded from interposing defenses available although not presented in the previous suit. Sewerage Commission v. Activated Sludge, 81 F. (2) 22.

Liability of Municipal Contractors and Sureties

In Consolidated Contract Co. v. Hassam Paving Co., 227 F. 436, 442, the court said: "the fact that the City of Portland saw fit to specify Hassam paving for its streets at the request of the holder of the patents did not excuse one who underbid the owner of the patents for an infringement thereof, any more than if the owner of a rock quarry should induce the city to specify rock for use in a street of a quality to be obtained only from his quarry would justify the successful bidder appropriating the rock without paying for it." Those who supply materials and fill contracts with knowledge of and intent to aid a municipal board's infringement are liable as contributory infringers. Fehr v. Activated Sludge, 84 F. (2) 948.

A surety under a bond to indemnify a city against liability for infringement is liable as a joint infringer for aiding and abetting the infringement. "It is urged that the appellees have no cause of action against the Surety Company on the indemnity bond, and this is true. But here the suit is not on the indemnity bond, but it is for the tort of the Surety Company in aiding and abetting the infringement, whereby it became a joint infringer." Reliance Const. Co. v. Hassam Paving Co. et als, 248 F. 701. A surety cannot be added to a pending infringement suit as an additional defendant under writ of scire facias authorized by state statute. Hunter v. Allegheny County, 30 U. S. Pat. Q. 188.

Decree Against Municipality

If the plaintiff prevails there is the usual reference to a master for an accounting. An injunction will not be issued where the harm ensuing to the municipality would be greater than the benefit to the plaintiff —the "balancing of convenience" doctrine. Thus an injunction to restrain the use of an allegedly infringing ventilating device in a court house was refused, for to deny ventilation would "embarrass the administration of the state's justice." McCreery Eng. Co. v. Mass. Fan Co., 180 F. 115. In Bliss v. Brooklyn, 3 Fed. Cas. No. 1544, an injunction was denied "because of the fact that the couplings in question are necessary for the daily use of the city in prevention of fires," and in Ballard v. City of Pittsburgh, 12 F. 783, the court said: "Inasmuch as any interference with the use of the wooden pavement constructed in the City of Pittsburgh, in infringement of complainant's rights, would only operate injuriously upon the public, without benefiting the complainants, an injunction will not be granted. But there must be a reference to a master to ascertain profits and damages, and a decree will be accordingly entered." In Thacher v. Mayor et al, 219 F. 909, the city had a bridge built incorporating infringing arches. The court said: "the plaintiff is therefore entitled to a decree for an injunction and an accounting. The injunction, however, will be limited to forbidding future infringements. It will do the plaintiff no good to decree the destruction of the present structure and the city much useless harm." In City of Milwaukee v. Activated Sludge, 69 F. (2) 577, 593, the court said: "If, however, the injunction ordered by the trial court is made permanent in this case, it would close the sewage plant, leaving the entire community without any means for the disposal of raw sewage other than running it into Lake Michigan, thereby polluting its water and endangering the health and lives of that and other adjoining communities. It is suggested that such harmful effect could be counteracted by chemical treatment of the sewage but where, as here, the health and lives of more than half a million people are involved, we think no risk should be taken, and we feel impelled to deny appellee's contention in this respect."

Liability of County Boards

County boards have been held liable for infringement and state legislation exempting them has been held to be ineffective. In May v. County of Ralls, 31 F. 437, the court said: "A state cannot exempt counties from liability for patent infringement for exclusive jurisdiction over that subject matter has been vested in the federal government," and R. S. sec. 4919 does not exempt counties from liability. In May v. County of Logan, 30 F. 250, 258, the county board of commerce was held liable for patent infringement. It cannot plead ultra vires, said the court, for it had authority to contract for installation of jail locks and is liable for the installation of infringing locks. In Hunter v. Allegheny County, 32 U. S. Pat. Q. 302, the court found that "the defendant is a quasi municipal corporation located in and an inhabitant of the Western District of Pennsylvania," and granted plaintiff an injunction against future infringement and an accounting for past infringement. In May v. County of Mercer, 30 F. 246, 247, it was held that the "counties in Kentucky are more than mere political subdivisions of the state. They are corporations, and, within the scope of the powers given, can contract and be contracted with, and as a consequence, sue and be sued." Contra: May v. County of Juneau, 30 F. 241, holding that the county board of supervisors is a board of limited authority, not the general agent of the county. The board specified patented locks. It was held that they had a right to expect that the contractor would install locks under license of the patentee; the county was held not liable. Affirmed on ground patent was invalid, 137 U. S. 408. See also McCreery Eng. Co. v. Mass. Fan Co., 180 F. 115.

In May v. County of Saginaw, 32 F. 629, 630, it was held that a Michigan constitutional provision vesting in the board of supervisors "exclusive power to adjust all claims against their respective counties, and the sum so fixed and defined shall be subject to no appeal" did not apply to torts and moreover could not bind non-residents suing in the federal courts. Contra: May v. Buchanan County, 29 F. 469; May v. Jackson County, 35 F. 710.

In Standard Fireproofing Co. v. Toole (The Governor and members of the state capitol commission individually), 122 F. 649, it was held that members of the commission are not individually liable for their action as commissioners in contracting for infringing articles. In Fiske v. Wilbur, 2 U. S. Pat. Q. 135

(reversed on another ground, 10 U. S. Pat. Q. 212), a contrary rule is set forth.

CONCLUSION

A consideration of the authorities reviewed should serve to admonish municipalities and separately incorporated boards and departments against trespassing on patent rights; unless they are willing to be bound by the decision as res adjudicata, they should refrain from active participation in the defense of any infringement suit in which they are not defendants.

London Letter

Inheritance

A BILL "to amend the law relating to testamentary dispositions and for other purposes connected therewith" was presented in the House of Commons on October 27th, 1937. It is word for word the same as the one introduced and amended by a Standing Committee in the earlier part of the year. The object of the bill, as stated by its mover, is to provide that a spouse or children left without reasonable provision for maintenance shall have the right to appeal to the Court, which, having regard to all the circumstances of the case, might make such provision as it thinks fit from the estate of the deceased husband and father or wife and mother. England, Wales and Ireland stand almost alone among the civilized countries of the world in enabling a man or woman to dissolve by death the financial responsibilities attached to marriage and parenthood. In Scotland both husband and wife are entitled to one-half of the movable estate where there are no children, and to one-third where there are children. Children are entitled to one-third of the estate of the parent dying first and one-half of that of the parent dying last. In New Zealand, most of the States of Australia and certain provinces of Canada, the law is similar to the provisions contained in this bill, in that the Court may order that suitable provision shall be made. On the second reading of the bill emphasis was laid on the fact that there would have to be an application by the spouse or the children to the Court, which must decide whether provision should be made; that the bill applies only to the will of a husband or a wife, and of a father or a mother; that the only persons granted the right of appeal are wife, husband and children; that "a child" means any child, whatever the age; that a dependent is not granted a specified portion of the testator's estate. He or she having merely the right to apply to the Court; and that an application must be made within six months of the granting of probate.

In the discussion on the measure before the Standing Committee of the House of Commons on November 23rd, the Solicitor-General (Sir Terence O'Connor), who had moved the first of a series of amendments, intervened with proposals which, he suggested would make the bill a workable measure. He said that the Government had not been able to lose sight of the fact that at least three times the House of Commons had shown a disposition to prevent the injustice which arose in some cases from the exclusion of a widow or child from the bounty of the testator, and he went on to suggest the limits of what, in the Government's view, would be a workable measure. A workable measure should provide for the maintenance of a widow during widowhood out of income, and not from a portion of capital. It should be limited to that and to the maintenance of children under age, or, in the case of children over age, spinsters or disabled sons. There should be no question of allotment of a fixed portion of capital out of the estate. It was recognized by the Government that there might be cases, such as the case of a very small estate, where it would be desirable to give a discretion to the Court to make provision either by allotment from income or allotment from capital. Much had been said about the absence of any guidance to the Court to exercise discretion and it was felt therefore, that "a workable scheme should provide for some upper limits to which the Court could work."

For the guidance of the promoters of the bill Sir Terence suggested that there should be something of the order of a maximum allotment of income, up to one-half in the case of a childless widow during widowhood: up to one-third in the case of a widow with children, and one-third for the children, making two-thirds out of the whole estate: and up to one-half in the case of children who were left unprovided for without a mother. In the case of really small estates, up to £2,000, it should be open to the Court to make a lump sum grant out of the estate, up to the same proportions as prevailed in the case of income, or partly income and partly capital. "There is one point," said Sir Terence, "to which I desire to call particular attention, after consultation with the Attorney-General and the Lord Chancellor. That is that in no circumstances does the Government consider that a workable measure of this kind should be delegated to the county courts. An entirely new discretion is being introduced in this bill, something quite unknown in our law, and it is desirable that some code of rules regulating that discretion should be built up. These rules can be evolved by the judges of the Chancery Division, working together, and establishing some system. In the view of the Government it would be quite impossible to permit 60 county court judges, in different parts of the country and without opportunities of consultation, to promote a code of discretionary rules to be worked out in that way. That does not mean that for ever afterwards cases of this kind would necessarily have to be tried in the Chancery Division. It means that until a scheme of this kind has been tested and kept working for some years, cases would be tried in London where some kind of recognized administration could be assured."

If these proposals were acceptable to the promoters of the bill, the Government, said Sir Terence, would be prepared to accord them the assistance of Parliamentary counsel to put into form the kind of limits that he had been suggesting. The suggestion, having been accepted with gratitude, the Committee adjourned consideration of the measure for a fortnight.

In most of the States of the United States and in many foreign countries the legislature has made some provision for restricting freedom of testation and it now seems that there is some real prospect of a change in the law in this country being effected.

Etiquette

An instance of the jealousy with which the etiquette of the Bar in England is guarded by the General Council of the Bar appears in a notice recently issued by them in which it is stated that the attention of the Council has been called to the publication of the first issue of the Classified Trades Telephone Directory

(Authorized by His Majesty's Postmaster-General and the Controller of the Stationery Office) which contains a list of Barristers. Although the Council are not aware of any barrister having been approached before inclusion of his name therein, they have passed the following resolution: "That it is contrary to professional etiquette for any member of the Bar to insert his name or cause or authorize the insertion of his name in the Classified Trades Telephone Directory." It is not clear whether the resolution is a protest against the inclusion of professional men in a *trade* directory, or whether it is designed to avoid anything in the nature of advertisement which is contrary to legal etiquette.

Incidentally the use of the word "advertisement" recalls one which appeared many years ago in the following terms: "To be sold, 151 suits in law, property of an eminent attorney, about to retire from business. Note, the clients are rich and obstinate."

Divorce Judges

The Bill to provide two additional Judges to deal with the anticipated increase of work in the Probate, Divorce and Admiralty Division of the High Court of Justice, to which reference was made in the last "London Letter," was rapidly passed by both Houses and received the Royal Assent on December 9th. Its title is the "Supreme Court of Judicature (Amendment) Act," and, under its provisions one additional judge will be permanent. The other, after the lapse of a year, will not be made unless an Address by both Houses of Parliament represents that the state of business in the Court requires an additional judge. The Division at present consists of a President and two puisne Judges. The effect of the Act will be immediately to increase the Division to a President and four puisne Judges. But if a vacancy occurs in that number after a year, so that the total falls to three puisne Judges, the fourth place will not be filled except by an Address from Parliament. If no address is passed and another vacancy occurs, reducing the number from three to two, then that vacancy can be filled without an Address from Parliament.

In its progress through the Commons the bill met with considerable opposition, not on the ground that the two extra Judges were not required (for, as Sir Stafford Cripps stated, "justice, in order to be efficient, must be swift"); but for the reason that it was thought better to strengthen the general body of Judges, so that divorce might be dealt with by the King's Bench Judges —a view which has lately gained considerable support not only in the House of Commons but also at the Bar. It was contended that no special qualification was necessary for a Judge to try a divorce case, and it was also pointed out that thousands of them had been tried on circuit by Judges of the King's Bench Division without complaint that such Judges were incapable, because of the highly technical points that are raised, of dealing with them. There are many advocates for the abolition of the Divorce Division, and they hold that Admiralty work might be transferred to the Commercial Court, Probate to the Chancery Division and Divorce to the King's Bench Division. The matter was considered by the Peel Commission in 1933 but nothing was done.

Mr. Clement Davies, in supporting the contention that there was no need to appoint a specialist to deal with divorce said: "When I first went to the Bar the President was Mr. Gorell Barnes, afterwards Lord Gorell, an Admiralty Judge who I do not suppose before he sat on the bench had ever listened to a divorce case. He was followed by Mr. Justice Bigham afterwards Lord Mersey; again I am certain that he had never been inside a divorce court and never heard a divorce case; yet he was promoted to be President of that Division. The next man was a Member of this House. He was promoted after being Solicitor-General and having had a purely common-law practice, and was Sir Samuel Evans, one of the greatest Judges that ever sat in that Division. He was followed in turn by another common-law Judge, Mr. Justice Pickford as he was when he was appointed, and afterwards Lord Sterndale, who, as I know for a fact because I had the honour of acting as his secretary, had never heard a divorce case before he became President. After he was appointed Master of the Rolls he was followed by Sir Henry Duke, afterwards Lord Merrivale. I agree that Sir Henry, when he was at the bar, had had a certain amount of experience at divorce work, but that was only when he had been called in in great cases because of his influence with the jury, and not because he had any special technical knowledge. He was followed by an ex-Solicitor-General who admitted before the Peel Commission that he had had no experience of divorce before he was appointed."

Some years ago one of the Judges of the Probate, Divorce and Admiralty Division, when describing his work there, said that he had "one foot in the sea and the other foot in a sewer."

Middle Temple Bencher

Mr. Kenneth Mead Macmorran, K. C., has been appointed a Master of the Bench of the Middle Temple. He was called to the Bar thirty years ago and took silk in 1932. He is a recognized authority on ecclesiastical law and is Chancellor of no fewer than five dioceses: Chichester, Ely, Lincoln, St. Albans and Guildford. He is the son of the late Alexander Macmorran, K. C., a former Bencher and Treasurer of the Inn and a well known authority on every branch of the law affecting local government.

Inns of Court Treasurers

The new Treasurers appointed for the ensuing year in the four Inns of Court are: Mr. Justice Macnaghten, Lincoln's Inn; Mr. R. Storry Deans, Gray's Inn; The Lord Chief Justice, Inner Temple; and Mr. Justice Hawke, Middle Temple.

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The Temple.

A BRIEF SURVEY OF LEGAL PERIODICALS

(*Continued from page* 123)

ary process through which they have progressed. It is to be expected, of course, that the process will continue as new opportunities for greater service unfold. The law reviews have become an accepted instrumentality in connection with both the teaching and the practice of law. The bar periodicals serve equally useful functions in the hands of practicing lawyers, while the specialized periodicals are indispensable to the specialist. It is reasonably safe to predict that at least these three types of legal periodicals are here to stay, since they are playing a most important role in molding trends of thought, both within and without the law schools, in the shaping of legislation and in reflecting the general trends of judicial thought.

THE LAW IS A JEALOUS MISTRESS: A POPULAR FALLACY

BY JOSEPH W. PLANCK

Member of the Lansing, Mich. Bar

BLACKSTONE said, "The lady of the Common Law likes to lie alone." To the contrary is the eminent authority of John Selden: "The proverbial assertion that Lady Common Law must lie alone never wrought with me."

Thus is framed an issue of which Charles Lamb might well have disposed in the Essays of Elia, where he undertakes to disprove certain popular fallacies. The subject might well have proposed itself to one reared, as was he, within the classic walls of the Inner Temple. That the law is a jealous mistress has been heard for several centuries in Anglo-American law. It is perhaps, time that this venerable ghost were laid.

Thackeray describes a great lawyer, who best exemplifies the fruit of the fallacy, in these terms:

"He was a man who had laboriously brought down a great intellect to the comprehension of a mean subject, and in his fierce grasp of that, resolutely excluded from his mind all higher thoughts, all better things; all the wisdom and philosophy of historians; all the thoughts of poets, all wit, fancy and reflection; all art, love, truth, altogether so that he might master that enormous legend of law. He could not cultivate a friendship or do a charity or admire a work of genius or kindle at the sight of beauty. Love, nature, and art were shut out from him."

What a libel on a great profession and how utterly false! The horizon of the law is as broad as human life itself, and all culture is its domain. All knowledge and learning is grist for the lawyer's mill. What is the subject of a lawyer? Let us hear the word of Juvenal :

"Whatsoever it is that mankind does, their hopes, their fears, their angers, their pleasures, their vagaries, their delights, all of these things form the subject of our creation."

Dean Leon Green of Northwestern University Law School writes as follows in discussing preparation for the bar:

"What formula short of all knowledge can be written? The student cannot slight his own language and its literature for they give him the power of thought and articulation without which he cannot function. Government, economics, and history in their fullness are all basic. Of all studies, they give meaning to law. The natural sciences he must have to give him understanding of the world he lives in, and to break the chains of prejudices which have so greatly hampered his forbears. Psychology, sociology and anthropology are gaining significance as the importance of human behavior and human welfare comes to the fore in the emerging order. And for purposes of a sustaining base, how can the lawyer survive without some integrating philosophy of all learning and all life?"

A learned judge, Hon. Merrill E. Otis, holds that,

"To say that he is learned in the law who has committed some or many of its rules to memory, who knows not history and philosophy and science and literature and jurisprudence is to give a poverty stricken meaning to an opulent, ancient phrase."

Indeed, Lady Common Law imperatively requires a host of bedfellows. Some of them are decidedly practical. The law was the first of the social sciences and tends to remain aloof even today. The concept of natural law, inimitable and preordained, long delayed the idea that law is a useful, social device. The end of the law may be said to be the attainment of social justice. It is only one of several disciplines striving toward that end. Taxation is now a matter, not only of producing revenues, but of exercising social control—which is a fact whether we admit it or not. The time-honored theory of the proper sphere of government is in the process of being re-defined in much broader terms. Lawyers today must be political scientists, economists and sociologists, as were Hamilton, Jay and Madison.

One more authority may suffice for the complete refutation of the ancient libel with which we are concerned. Lord Macmillan, whose recent demise was widely noted in the press of this country, once spoke to American lawyers in Chicago:

"No lawyer is justly entitled to the honorable and conventional epithet of 'learned' if his learning is confined to the statutes and law reports. It is the province of the lawyer to be the counsellor of persons engaged in every branch of human activity. Nothing human must be alien to him. 'You are a lawyer', said Dr. Johnson to Mr. Edwards; 'Lawyers know life practically. A bookish man should always have them to converse with. They have what he wants.' Equally the man of letters has what the lawyer wants, for if he is to fulfil his role usefully and wisely he must have a mind not merely stored with the precedents of the law but possessing that width of comprehension, that serenity of outlook and that catholicity of sympathy which can nowise be so well acquired as from consort with the great masters of literature. In such company is found the corrective for the narrowness of mere professionalism. The lawyer does well from time to time to lift his eyes from his desk and look out of the window on the wider world beyond. There can be a too sedulous devotion to the text-books of the law and I do not commend the example of Chief Baron Palles, who is said to have taken Fearne on Contingent Remainders with him for reading on his honeymoon."

Let us recall a great lawyer created by Sir Walter Scott in Guy Mannerings. Colonel Mannering is paying a visit to the study of his counsel, Mr. Pleydell, in the High Street of Edinburgh.

"The library into which he was shown," we read, "was a well-proportioned room, hung with a portrait or two of Scottish characters of eminence by Jamieson, the Caledonian Vandyke, and surrounded with books, the best editions of the best authors and in particular an admirable collection of classics. 'These,' said Pleydell, 'are my tools of trade.' A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.'"

Let us prepare a grave both wide and deep and respectfully inter this hoary proverb, that the law is a jealous mistress, to which we have so long paid lip-service. In the same sepulture belongs Thackeray's lawyer. Requiescat in pace!

"I am not bound to win, but I am bound to be true. I am not bound to succeed, but I am bound to live up to what light I have. I must stand with anybody that stands right; stand with him while he is right, and part with him when he goes wrong."—Abraham Lincoln.

Current Events

(*Continued from page* 95)

Hatch and referred to the Committee on the Judiciary. It is S. 3233, and would authorize the President to appoint, by and with the advice and consent of the Senate:

(a) Four additional circuit judges, one for each of the following judicial circuits: Second, fifth, sixth, and seventh;

(b) One additional associate justice of the United States Court of Appeals for the District of Columbia;

(c) (1) Seventeen additional district judges, one for each of the following districts: Northern district of Georgia, eastern district of Louisiana, western district of Louisiana, southern district of Texas, eastern district of Michigan, northern district of Ohio, western district of Washington, southern district of California, district of Kansas, northern district of California, southern district of Florida, northern district of Illinois, district of Massachusetts, district of New Jersey, southern district of New York, eastern district of Pennsylvania, and western district of Virginia; and (2) two additional district judges, one for each of the following combinations of districts: Eastern and western districts of Arkansas; and eastern, middle, and western districts of Tennessee; and

(d) Three additional associate justices of the District Court of the United States for the District of Columbia.

Another bill introduced by the same Senators, S. 3232, would permit retired Justices of the Supreme Court to be designated for service in the District of Columbia. It merely adds a section, to the Act of March 1, 1937, providing that "The term 'judicial circuit' as used in this Act includes the District of Columbia."

Propriety of Conduct—Judicial and Departmental

Presentation by the Executive Department of the Government, acting through the Attorney General, to the Legislative Department, by way of the Judiciary Committee of the House of Representatives, of a complaint against the Judicial Department, as represented by United States District Judge Ferdinand A. Geiger, of the Eastern District of Wisconsin, cannot but have many interesting implications for the legal profession. The basic points of this action therefore are worthy of note regardless of its outcome.

The chief point of the Attorney General's complaint was that Judge Geiger, at Milwaukee, "discharged a grand jury without permitting it to report after a three months' investigation of the automobile finance industry . . . thus preventing criminal proceedings . . . [and making] it impossible for this Department to obtain a civil decree which would have given immediate relief to consumers from the payment of excessive reserve charges, relief to dealers from coercion by automobile companies, and relief to independent finance companies from unfair competition and restraint of trade."

It was explained that the investigation, which the Department had instituted upon complaints, was "of the automobile finance industry, chiefly centered in three large companies which were identified in interest with General Motors Corporation, Ford Motor Company and Chrysler Corporation." The Attorney General's communication, after setting forth Judge Geiger's act in some detail, concluded: "This course of conduct is so obstructive to the administration of justice that I could not justify a failure to bring it to your knowledge. This Department stands ready to submit to your Committee all of its pertinent documents, and its staff will appear at any time to answer any questions concerning the foregoing matters."

Suggestions of a number of the points on Judge Geiger's side of this controversy appear in some of the remarks and questions at the opening of the hearing before the Judiciary Committee of the House, of which Representative Hatton W. Sumners, of Texas, is Chairman. Appearance for the Department of Justice was made by Assistant Attorney General Robert H. Jackson.

To the suggestion that it was improper for a Department of Justice official to negotiate for a consent decree covering subject matter before a grand jury, Mr. Jackson said, "Let's be clear on that. I am quite confident we would never get consent decrees if it were not for our right to go before the grand jury." Representative Frank W. Towey, Jr., of New Jersey, then quizzed, "In other words, you use compulsion?" Mr. Jackson replied, "Yes, otherwise, we could never get consent decrees against the big companies. They don't fear a civil suit as they have nothing to lose by taking their chances before a judge."

Representative Earl C. Michener, of Michigan, suggested that the Department had used "an amplified third degree." Mr. Jackson denied doing this and indicated a desire to ascertain whether the Committee disapproved of the Department's practice. He suggested that it would not have to use the methods it had employed if it had the power under the anti-trust laws to compel testimony from prospective civil case defendants. Mr. Jackson stated that there was much evidence against Judge Geiger not yet in the record; and said, "We've had a great deal of difficulty in that district. We have even had indictments dismissed after defendants had pleaded guilty." He continued, "But we will not seek any consent decrees in the future if this Committee doesn't want them." Chairman Sumners challenged this point of view with the inquiry: "What has this Committee got to do with it?"

President Benjamin Poss, of the State Bar Association of Wisconsin, said it would be proper to seek a civil decree after indictments had been returned, but not while they were pending. He declared that he was "astounded to hear from the lips of an Assistant Attorney General the assertions it is proper for the Government to use the threat of criminal proceedings to coerce a prospective civil defendant." Following Mr. Jackson's statement to the effect that it would be impossible adequately to enforce the anti-trust laws in civil proceedings unless they could use the threat of criminal prosecution to obtain information, Representative Michener said, "Then you are pleading confession and avoidance?" To this Mr. Jackson rejoined with a decided, "No."

Representative John M. Robsion, of Kentucky, declared he wanted to know whether Mr. Jackson contended the judge had acted corruptly or in good faith, and continued, "If it is not your contention that he acted corruptly, I don't believe he should be punished." Mr. Jackson disclaimed "asking that the judge be punished" but said he wished to present to the Committee his "course of conduct" and to cite instances throwing light on Judge Geiger's temperament. In reply to the inquiry of whether he did not in fact want the Committee to institute proceedings for the impeachment of Judge Geiger, he said the Committee did not have to institute impeachment proceedings and that the Department had brought its grievance to the only available place.

It was shown that Judge Geiger has served 25 years on the bench. There was submitted in his behalf a brief by the State Bar Association of Wisconsin and the Milwaukee County Bar Association. The brief declared that "the discharge of the grand jury was warranted by the facts. Far from being an

obstruction of justice, Judge Geiger's ruling was plainly in furtherance of justice." In another place, after referring to the record in the case, it said:

"It is the duty of a court to see to it that the proceedings in so delicate and serious a matter be kept above suspicion. The Court was faced with a record from which it might be argued that (1) interested parties were told that criminal indictments would issue unless consent decrees were agreed upon; (2) the consents to civil decrees were being traded for freedom from criminal prosecution; (3) the deliberations and judgment of the grand jury were being subjected to influences arising from the negotiations for civil decrees; (4) the negotiations comprehended matters before the grand jury making it impossible to keep secret the proceedings of the grand jury; and (5) the grand jury was disabled from discharging its duties by being made a party to the negotiations.

"The Court could not ignore the possible reflections thrown upon the integrity of its proceedings. Apart from this it was far wiser to leave the entire matter for another grand jury than to expose the indictments which might have been returned by this one, to attack on such grounds."

Bar Admission in District of Columbia and Texas

DEVELOPMENTS in reference to bar admission requirements have occurred in the District of Columbia and in Texas. In the former place the Federal Bar Association, an organization composed of lawyers having some connection with the federal government, after a discussion of bar admission requirements, passed a resolution which reads, in part, as follows:

"Be it resolved that the Federal Bar Association place itself on record as favoring the adoption in all states of the Union and the District of Columbia of a requirement of two years of college education in a recognized college or university before the commencement of law study as a qualification for taking the bar examinations, provided however that students who have not completed the two full years of college education as referred to above shall be permitted to take the bar examinations if they have finished the high school course and have passed an examination given by a duly accredited college or university, such as would entitle them to enter such college or university with full junior standing.

"Since the seat of the Federal Government is located in the District of Columbia and the large percentage of the Federal Bar Association membership is stationed in the District and is concerned vitally with the qualifications of governmental and private practitioners, and since such a large number of persons are admitted annually to the bar of the District (namely, 2757 in the ten-year period from 1920-1929; and over 500 each year thereafter) be it further resolved that the Federal Bar Association place itself on record as favoring the adoption of a requirement of two years of college education in a recognized college or university before the commencement of law study as a qualification for taking the bar examination in the District of Columbia and that this requirement shall not be made effective as to students who shall have started the study of law prior to September 1, 1938, provided however that students who have not completed the two full years of college education as referred to above shall be permitted to take the bar examination in the District of Columbia if they have finished the high school course and have passed an examination given by a college or university duly accredited by the Association of Schools and Colleges of the Middle States and Maryland, such as would entitle them to enter such college or university with full junior standing."

* *

In Texas rules of the Supreme Court requiring two years of college education for admission have provided that the local bar association shall be responsible for qualifying a law school as one to be approved. The rule in this regard reads as follows:

". . . If declarant proposes to study law in the office of an attorney or a law firm, or in a law school that is not on the approved list of the American Bar Association, then such declaration shall show the name and address of the attorney or law firm or school, and shall be accompanied by a certified declaration of the local bar organization, or if no such organization exists in the county, then by a declaration of the district judge for the judicial district in which the county is located, certifying the said attorney, firm of attorneys, or professors, of said law school, to be a fit person, or persons, morally, intellectually, and by reason of legal attainments, to guide and instruct the declarant in the pursuit of his legal studies."

The Dallas Bar Association has taken action to bring the law schools in that city up to American Bar requirements by passing the following resolution:

"Resolved, That the Dallas Bar Association adopt the standards promulgated by the American Bar Association with reference to pre-legal and legal training for admission to the bar, and that we certify to the Board of Legal Examiners of the State of Texas all candidates who are graduates from law schools that comply with such standards as herein outlined, and such candidates only, and that this rule shall become effective on and after July 1, 1938."

Lawyers and Laymen Unite in Missouri Organization

THE Law Institute for Criminal Justice, which held its organization meeting in Columbia, Missouri, on December 11, with more than one hundred lawyers and laymen in attendance, is proceeding actively to carry out the purpose of its creation. That purpose is to serve as an effective means of implementing worthy programs from time to time which are suggested by Bar Associations or committees, but which need a broader support than merely the legal profession.

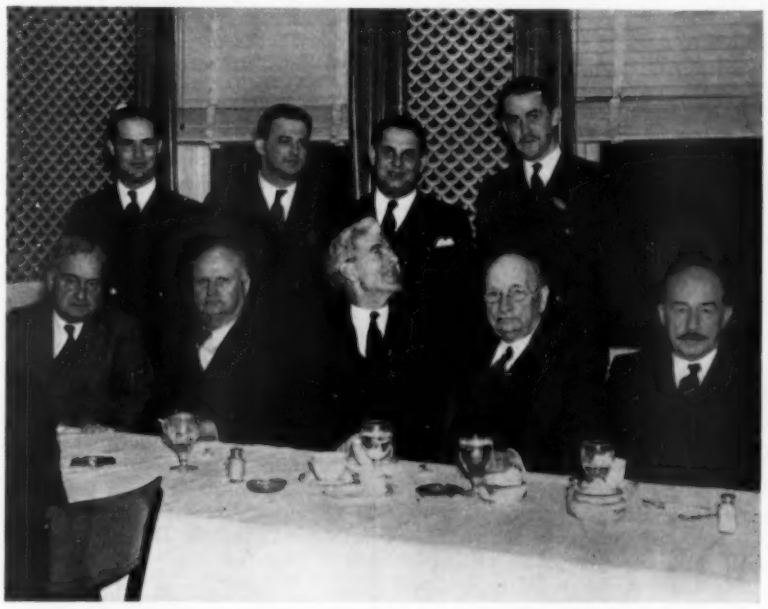
A letter from Mr. Kenneth Teasdale, of St. Louis, former President of the Missouri Bar Association, during whose administration the plan for the Institute was conceived, gives a definite idea of the reasons that brought the Institute into being. It says, in part:

"The main one was an effort to provide a broader backing for recommendations to the legislature. The Bar had found that it was extremely easy for that body to turn down a group of lawyers who were making recommendations for the revisions of the Code and other matters, on the theory that they represented but an isolated group of citizens. It was felt, however, that if the lawyers could find some sort of machine by which the lawyers could align themselves with laymen, this disadvantage could, to some extent, be done away with. The legislature would not then be able to turn a deaf ear to the lawyers on the theory that they were not representative, and if it did so, there would be the nucleus of an organization, lay and professional, capable of taking the matter direct to the voters by initiative.

"With this view, Chambers of Commerce and other civic organizations in numerous communities, were asked to recommend laymen to represent their community in such an organization. The response was most encouraging and a thoroughly representative lay membership was assured. The lawyers, of course, had no difficulty in choosing their own personnel. At present the organization consists of one hundred laymen and fifty lawyers, with six laymen and twelve lawyers as directors. Mr. J. Lionberger Davis, of St. Louis, is President. Mr. Leland Hazard, of Kansas City, is Technical Expert and a member of the Board of Directors."

Junior Bar and the Bench

THE Supreme Court of Arkansas attended the recent meeting of the Junior Bar Association of Little Rock, which is actively undertaking suppression of unauthorized and unethical practice of the law, somewhat along the lines pursued in Missouri. Two committees have been appointed and at the regular monthly meeting, on November 29, 1937, they reported the activities to more than one hundred members and guests. The Junior Bar, according to Mr. Edward Bennett, of Little Rock, President of the local Association, is greatly encouraged by progress already made and particularly by the distinct approval which the Supreme Court has given its efforts. Associate Justice Frank Smith and Associate Justice Turner Butler of the Supreme Court were unfortunately unable to attend the meeting on account of illness.



Arkansas Supreme Court Justices Attend Banquet of Junior Bar in Little Rock. Top Row L to R: Wayne W. Owen, First Vice-President; Jerry H. Glenn, Secretary-Treasurer; Edward Bennett, President; Gerland P. Patten, Second Vice-President. Seated L to R: Associate Justice E. L. McHaney; Associate Justice T. H. Humphries; Chief Justice Griffin Smith; Associate Justice T. M. Mehaffy; Associate Justice Basil Baker.

"A Little Learning" Has Unexpected Results

A HOPEFUL experiment in the shape of the Jury School of the United States District Court in New Jersey was abolished by an announcement from the four district judges on December 10, according to the New York Times. The judges did not give any reason for discontinuing the school, the first of its kind in the United States, but it was learned that attorneys had complained that graduates of the school, when they got on a jury, were inclined to act more like judges than jurors. It was also reported that they were inclined to pay too much attention to the law and not enough to the facts in the case.

The school was organized something over a year ago, and about ten sessions were held last winter, the first on January 16, 1937. It is estimated that 2,500 persons, a great majority of whom were women, attended sessions. The school got under way soon after women obtained the privilege of serving on juries in the district and received nation-wide publicity in newspapers and magazines. Its object, of course, was to acquaint citizens, particularly women, with courtroom procedure and the duties of jurors in considering evidence.

At the time, according to the New York Times, the hope was expressed that the school would be a means of checking a "tendency of the courts to grow overlegalistic." The unexpected result of the scholars growing overlegalistic themselves seems to have resulted in the downfall of this hopeful institution.

Texas Bar Association Starts Official Magazine

THE *Texas Bar Journal*, official publication of the Texas Bar Association, is the latest addition to the growing list of attractive bar publications. The first number appeared in January of the present year and contains a statement of the aims and objectives of the new publication by Hon. D. A. Simmons, President of the Texas Bar Association, under the title, "A Voice for the Bar." President Simmons says:

"With the publication of this first number of the *Texas Bar Journal*, our Association has become articulate. From a small beginning in 1882 the Texas Bar Association has grown to be one of the most active professional associations in this part of the country. The lawyer who fails to attend the annual meeting has difficulty in believing that the officers, directors and committees work steadily throughout the year, and he is prone to assert that the only activity of the Association with which he is familiar consists of mailing him two letters a year, one in the spring notifying him that his annual dues are payable and one in June stating that the annual meeting will be held somewhere the first week in July. The publication of the Journal is undertaken in part to eradicate this false impression, but more particularly to render a service to the profession in Texas. Its pages will be utilized for the publication of committee reports, for suggestions from the members, and, with your cooperation, to report local and district bar association activities and any other matter of interest to the bench and bar of this state."

The first issue contains much material of particular interest to the Texas bar. The reply of Chief Justice Cureton, of the Supreme Court, to the tributes paid to him at a dinner in his honor, given by the lawyers and judges of Texas, at which a portrait of him was unveiled, is one of the most interesting items and is printed elsewhere in this issue.

Stair Society Issues Annual Report

THE Stair Society, which publishes the sources of what it is careful to call "Scots" Law announces in its Third Annual Report that the members will soon receive the first volume of Sir Thomas Hope's "Major Practics," edited by Lord Clyde, and that an early publication after that will be Baron Hume's "Lectures on the Law of Scotland," edited by Mr. G. Campbell H. Paton. Lord Hermand's "Consistorial Decisions," the St. Andrew's "Formulare," the "Justiciery Registers of Argyll and the Isles," and "Records of the 16th Century Burgh Courts" are further

publications in preparation or contemplation.

This "Scots" Society has a record of which the Selden Society, publishing English sources, and the American Legal History Society may well be envious. In their third year they have more members than either of the others and have increased their membership by almost double the loss by death.

The Secretary for America is Robert W. Millar, Northwestern University School of Law, McKinlock Campus, Chicago.

The Fourth Year Is the Hardest

THE fourth year of marriage is the most dangerous, at least in Connecticut, according to a ten year statistical study of the courts of that State under the supervision of Dean Charles E. Clark and Professor Harry Shulman of the Yale School of Law.

"The investigators found," according to a press release summarizing the report, "that divorce cases constitute the largest single class of civil cases, and that the fourth year of marriage is the most critical, judging from an analysis of the suits for divorces filed. A larger percentage of cases were instituted by parties who were married three years and were in their fourth than in any other single year. The percentages in the fifth and sixth years, however, were only slightly smaller. The most common ground for divorce was desertion. There was little contest in the divorce actions; and divorce was denied in comparatively few cases."

The study further shows that one of the most troublesome of the problems which have arisen within recent years is the constantly increasing automobile accident litigation. The courts, we are told, have become an agency for the collection of debts and enforcement of mortgage security, for the award of compensation for automobile accidents, and for the formal approval of dissolution of the marriage tie, and many historic fields of law, such as slander and libel, are today of very little importance, from the standpoint of the number of cases now coming into the court.

The study also shows, according to the statement issued, that the use of the jury in civil litigation does not come up to the expectations of those who believe that it is only through a jury that impartial justice can be administered. "Whatever the political, psychological or jurisprudential values of the jury as an institution may be, its use in the civil litigation covered by this study is not impressive. The picture seems to be that of an expensive, cumbersome and comparatively inefficient trial device employed in cases where exploitation of the situation is made possible by underlying rules."

"The data collected in this study," the authors state, "were not sought for the purpose of formulating reforms in the administration of law. Some of the data may be useful without further investigation, but some of it will merely serve to open fields for further investigation, and for many purposes the data can be adequately treated only by persons with adequate statistical training."

The results of the study have been published by the Yale University Press under the title "A Study of Law Administration in Connecticut."

NOTICE OF BOARD OF ELECTIONS

FEBRUARY 25th, 1938, is the final date by which nominating petitions for State Delegates to be elected in 1938 must be filed. Details concerning the same are contained in the prior notices of the Board of Elections appearing at page 899 of the November, 1937 issue of the Journal and page 919 of the December, 1937 issue of the Journal. Copies of forms of nominating petitions, both with respect to State Delegates to be elected in 1938 and State Delegates to fill vacancies existing on or before February 15th, 1938, will be sent upon request addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

EDWARD T. FAIRCHILD
Chairman, Board of Elections

ALABAMA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate William Logan Martin, of Birmingham, Alabama, for the office of State Delegate for and from the State of Alabama, to be elected in 1938:

Henry Upson Sims, Jim C. Smith, Gerry Cabaniss, Forney Johnston, Benjamin Leader, J. T. Stokely, Andrew J. Thomas, R. L. Lange, J. A. Simpson, Atwell J. Brown, L. R. Hanna, R. D. Gilliam, Jr., Douglas Arant and M. M. Baldwin, of Birmingham;

John L. Goodwyn, Alex A. Marks, Davis F. Stakely, Fred S. Ball, Fred S. Ball, Jr., Geo. T. Garrett, Thos. B. Hill, Jr., Richard T. Rives, J. Mac Jones, Lee H. Weil, Francis M. Kohn, H. F. Crenshaw, H. F. Crenshaw, Jr., John P. Kohn, Jr., Ray Rushton, R. E. Steiner, R. E. Steiner, Jr., Sam Rice Baker, B. P. Crum, Leon Weil and Henry C. Meader, of Montgomery;

Wm. B. Dortch, O. R. Hood, Frank J. Martin and W. G. Rains, of Gadsden; Charles H. Eyster and E. W. Godbey, of Decatur; Earl R. Ford, M. U. Griffin, C. L. Watts and Milton H. Lanier, of Huntsville; W. H. Mitchell and H. A. Bradshaw, of Florence.

ARKANSAS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Henry M. Armistead, of Little Rock, Arkansas, for the office of State Delegate for and from the State of Arkansas, to be elected in 1938:

W. F. Coleman, F. G. Bridges and A. H. Rowell, of Pine Bluff; Thos. B. Pryor, Joseph M. Hill, Henry L. Fitzhugh, John Brizzolara, Harry P. Daily, John P. Woods, Joseph R. Brown, T. B. Pryor, Jr., James B. McDonough, Clinton R. Barry, Robert D. Scott, C. W. Knott and Lem C. Bryan, of Fort Smith; W. H. Arnold, Frank S. Quinn, Charles C. Wine, George F. Edwards and Richard L. Arnold, of Texarkana;

George E. Pike, of DeWitt; E. L. Westbrooke, of Jonesboro; W. V. Tompkins, of Prescott; Wm. E. Patterson, George M. LeCroy and J. A. O'Connor, Jr., of El Dorado; J. E. Gaughan, of Camden; T. K. Martin, C. T. Cotham and E. H. Wootton, of Hot Springs; Ernest Neill and S. M. Casey, of Batesville; Chas. A. Walls, of Lonoke; Harry J. Lemley, of Hope; Bernal Seamster, of Fayetteville; Gordon E. Young, of Malvern; Charles W. Norton, of Forrest City; Cecil Shane and Oscar Fendler, of Blytheville.

COLORADO

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate G. Dexter Blount, Equitable Building, Denver, Colorado, for the office of State Delegate for and from the State of Colorado, to be elected in 1938:

Robert E. More, Paul W. Lee, Nicholas Lakusta, William C. Benton, Christoffer F. Clay, M. A. Lewis, Peter H. Holme, Tyson Dines, J. Churchill Owen, Frazer Arnold, John E. Gorsuch, William R. Eaton, Wm. D. Morrison, Wilbur F. Denious, L. Ward Bannister, Henry McAllister, S. Arthur Henry, Frank L. Fetzer, Charles J. Kelly, John R. Coen, Erskine R. Myer, J. B. Grant, John T. Barnett, Frederick

P. Cranston, Henry H. Clark, Henry C. Vidal, William V. Hodges, Lowell White, W. Felder Cook, J. D. Pender, Lewis A. Dick, Clyde C. Dawson, Jr., James H. Pershing, John O. Rames, Robert J. Pitkin, James Owen, H. S. Robertson, W. D. Wright, Jr., Ernest B. Fowler, Philip S. Van Cise, Robert D. Charlton, Simon J. Heller, Frank C. West, Louis A. Hellerstein and Fred N. Holland, of Denver.

DELAWARE

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate James R. Morford, Delaware Trust Building, Wilmington, Delaware, for the office of State Delegate for and from the State of Delaware, to be elected in 1938:

Josiah Marvel, Jr., of Greenville; Arthur G. Logan and Richard S. Rodney, of New Castle; Sybil U. Ward, David F. Anderson, Daniel F. Wolcott, Wm. S. Potter, E. Ennalls Berl, Harold B. Howard, J. J. Morris, Jr., Joseph A. L. Errigo, William Prickett, Jos. S. Wilson, Charles F. Richards, Robt. H. Richards, Wm. G. Mahaffy, Herbert L. Cohen, Alexander L. Nichols, James M. Malloy, Wm. H. Foulk, Hugh M. Morris, S. Samuel Arsht, G. B. Pearson, Jr., Wm. H. Bennethum and Sam. F. Keil, of Wilmington; J. O. Wolcott, of Dover.

KANSAS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate W. E. Stanley, First National Bank Building, Wichita, Kansas, for the office of State Delegate for and from the State of Kansas, to be elected in 1938 to fill the vacancy now existing, and for the regular three-year term:

Earle W. Evans, W. F. Lilleston, Jos. G. Carey, George Stallwitz, Henry V. Gott, Carl G. Tebbe, C. H. Brooks, Howard T. Fleeson, Austin M. Cowan, Claude I. Depew, Lawrence Curfman, Lawrence Weigand, P. K. Smith, George B. Powers, C. H. Morris, George Siefkin, Robt. C. Foulston, Lester L. Morris, Sidney L. Foulston and Carl T. Smith, of Wichita; Chester Stevens, of Independence;

Robert M. Clark, James W. Porter, Bruce Hurd, Robert Stone, James A. McClure, Robert Webb, W. L. Shaffer, Jr., Ralph W. Oman, William A. Gray and John H. Hunt, of Topeka; John S. Dawson, of Topeka and Hill City; Albert Faulconer and Kirke W. Dale, of Arkansas City; S. C. Bloss, of Winfield; Carl Ackerman, of Sedan; Wesley E. Brown, W. D. P. Carey, J. G. Somers, William H. Vernon, Jr., and Roy C. Davis, of Hutchinson.

MAINE

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Clement F. Robinson, 85 Exchange Street, Portland, Maine, for the office of State Delegate for and from the State of Maine, to be elected in 1938:

Dana S. Williams, Fred H. Lancaster, Marguerite L. O'Roak and William B. Skelton, of Lewiston; Neal A. Donahue, George L. Wing, Jr., Alton C. Wheeler, and George C. Webber, of Auburn; Sanford L. Fogg, Jr., Robert B. Williamson, Herbert E. Locke, Lois H. Birkenwald and J. B. Campbell, of Augusta; Harold H. Murchie, of Calais; Clarence H. Crosby, of Dexter;

Raymond Fellows, George F. Eaton, James E. Mitchell and Charles P. Conners, of Bangor; Philip R. Lovell and Hannibal E. Hamlin, of Ellsworth; Carroll N. Perkins, of Waterville; Albert J. Sterns, of Norway; Leonard A. Pierce, Leon V. Walker, John F. Dana, Robinson Verrill, Edward F. Dana, Charles D. Booth, Harry M. Verrill, William S. Linnell, Porter Thompson and Wm. B. Nulty, of Portland.

MASSACHUSETTS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate George R. Grant, 50 Oliver Street, Boston, Massachusetts, for the office of State Delegate for and from the State of Massachusetts, to be elected in 1938:

Damon E. Hall, Charles F. Dunbar, Charles C. Cabot, Dunbar F. Carpenter, Robert G. Dodge, Stuart C. Rand, Willard B. Luther, Elias Field, Melville F. Weston, Daniel J. Lyne, Daniel Needham, Joseph W. Bartlett, Albert M. Chandler, Norman W. Bingham, Jr., Jay R. Benton, Henry Parkman, Jr., Charles F. Dutch, Frank W. Grinnell, Lothrop Withington, Alfred Gardner, Edward F. McClennen, Alexander Whiteside, Dudley P. Ranney, William H. Hitchcock, John N. Worcester, Talcott M. Banks, Jr., Richard Bancroft, Richard H. Field, Arthur L. Sherin, Charles W. Bartlett, William B. Sleigh, Jr., and Paul B. Sargent, of Boston; Franklin T. Hammond, Jr., of Cambridge, and John E. Buddington, of Watertown.

MISSOURI

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Ernest A. Green, Boatmen's Bank Building, St. Louis, Missouri, for the office of State Delegate for and from the State of Missouri, to be elected in 1938:

Judge James M. Douglas, of Jefferson City (formerly St. Louis), and Judge Geo. Robb Ellison, of Jefferson City; Boyle G. Clark, of Columbia; Judge Fred L. Williams, George C. Willson, Jr., Judge Fred L. English, Earl F. Nelson, R. F. O'Bryen, Taylor Sandison, Russell L. Dearmont, Lon O. Hocker, Jr., Wm. H. Killoren, W. A. Welker, Joseph H. Grand, Frank Y. Gladney, Herbert Bartholomew, James C. Jones, Jr., James C. Jones, Lon O. Hocker, Carleton S. Hadley, John P. McCammon, Geo. M. Hagee, Francis M. Curlee, J. Porter Henry and John Raeburn Green, of St. Louis; A. H. Kiskaddon, of Kirkwood.

NEBRASKA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Frederick S. Berry, Wayne, Nebraska, for the office of State Delegate for and from the State of Nebraska, to be elected in 1938:

Thomas S. Allen, Earl Cline, Clinton J. Campbell, E. F. Carter, Maxwell V. Beghtol, Guy C. Chambers, L. B. Day, Clarence A. Davis, L. A. Ricketts, William I. Aitken and Paul F. Good, of Lincoln; Raymond M. Crossman, Raymond G. Young, Abel V. Shotwell, Frank E. Randall, Robert D. Neely, W. C. Fraser, Francis S. Gaines, Barton H. Kuhns, Wm. C. Ramsey, Charles S. Reed, Clarence T. Spier, Francis P. Matthews, Henry Monsky, Wm. Grodinsky, Paul L. Martin and W. A. Schall, of Omaha; J. L. Cleary and H. G. Wellensiek, of Grand Island.

NEW YORK

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate George H. Bond, State Tower Building, Syracuse, New York, for the office of State Delegate for and from the State of New York, to be elected in 1938:

Charles W. Walton, Kingston (90 State Street, Albany), and Frederick G. Traver, of Kingston; Henry S. Fraser, Lewis C. Ryan, Stewart F. Hancock, Caleb Candee Brown, Jr., Ernest I. Edgcomb, Jerome K. Cheney, Myron S. Melvin and Crandall Melvin, of Syracuse; Kenneth S. Macaffer, Joseph Rosch and Julius Illch, of Albany; Philip J. Wickser, William Palmer, Willard W. Saperston and Howard T. Saperston, of Buffalo; Eugene Raines, Arthur B. Curran, George E. Mastrodonato, Robert C. Winchell, Herbert R. Reif, Arthur E. Sutherland, Daniel M. Beach, Paul Folger, Kenneth B. Keating, Edward Harris, William F. Strang, George F. Bodine, John J. Keilly, Harold H. Barnsdale and Andrew L. Gilman, of Rochester;

Arthur E. Sutherland, Jr., of Pittsford; Edw. J. Cook and Nathan D. Lapham, of Geneva; Mayer C. Goldman, Edward Gluck, A. Donald MacKinnon, Alfred McCormack, Robert C. Morris,

Edmund Ruffin Beckwith, Clarence J. Shearn, Jr., Arnold Frye, Dexter C. Hawkins, Lawrence Morris, Harold J. Gallagher, Nathan L. Miller, John W. Davis, Clarence J. Shearn, Harold H. Corbin, Edward J. Bennett, W. W. Miller, Weston Vernon, Jr., Cornelius W. Wickersham, Jr., William B. Hubbell, Robert C. Vincent, Alfred T. White, Robert Granville Burke, E. J. Dimock, R. E. Lee, Charles H. Strong, William L. Ransom, Charles S. Whitman, Richard Joyce Smith and Henry S. Reeder, of New York City.

OKLAHOMA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Joe S. Lewis, Ponca City, Oklahoma, for the office of State Delegate for and from the State of Oklahoma, to be elected in 1938:

Norma Wheaton, Jewell Russell Mann, Ray S. Fellows, Powell Clayton, E. D. Gillespie, A. B. Honnold, Louis W. Pratt, Gerald B. Klein, Harry L. S. Halley, R. B. McDermott, Thomas W. Francis, Floyd L. Rheam, T. Austin Gavin, Edgar A. deMueles, Alvin Richard, Sam Clammer and L. G. Owen, of Tulsa; L. H. Harrell, Ben Hatcher and A. W. Trice, of Ada;

V. P. Crowe, Raymond A. Tolbert, R. L. Wagner, Claude Monnet, G. W. Satterfield, Bland West, Charles E. France, Russell V. Johnson, Frank G. Anderson, Robert M. Rainey, Geo. M. Green, Chas. Hill Johns, Frank A. Chilson, David B. Richardson and Kent Shartel, of Oklahoma City; Fred B. H. Spellman, Merritt C. Mason and Everett Rauh, of Alva.

SOUTH DAKOTA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Lewis Benson, Huron, South Dakota, for the office of State Delegate for and from the State of South Dakota, to be elected in 1938:

Roy E. Willy, Holton Davenport, B. O. Stordahl, Herman F. Chapman, Verne H. Jennings, D. S. Elliott, R. A. Bielski, John P. McQuillen, Clarence C. Caldwell, John H. Voorhees, Howell L. Fuller, Melvin T. Woods, Frank Wickhem, Louis N. Crill, Gale B. Braithewaite, George J. Danforth, G. J. Danforth, Jr., Rex M. Warren, John Harold Fitzpatrick, Theodore R. Johnson, Charles Lacey, Peter G. Honegger and Theodore M. Bailey, of Sioux Falls; George Williams and George Philip, of Rapid City; St. Clair Smith (formerly of Aberdeen, S. D.), Karl Goldsmith and D. J. O'Keeffe, of Pierre; Vernon R. Sickel, of Mitchell; Merrell Quentin Sharpe, of Kennebec; Dwight Campbell and Van Buren Perry, of Aberdeen.

WISCONSIN

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Carl B. Rix, Wells Building, Milwaukee, Wisconsin, for the office of State Delegate for and from the State of Wisconsin, to be elected in 1938:

Frank T. Boesel, Gerald P. Hayes, Louis Quarles, Arthur W. Fairchild, Leon F. Foley, Rodger M. Trump, William A. Hayes, J. G. Hardgrove, Albert B. Houghton, Edgar L. Wood, Ralph M. Hoyt, Edmund B. Shea, William Doll, John C. Warner, Benjamin Poss, John A. Kluwin, Stewart G. Honecke and Rudolph A. Schoenecker, of Milwaukee; John C. Doerfer, of West Allis; O. A. Oestreich, M. O. Mouat, Roger G. Cunningham, Pierpont J. E. Wood, Stanley M. Ryan, Paul N. Grubb and Thomas S. Nolan, of Janesville; R. B. Graves, Robert S. Goggins, Frank W. Calkins and John Roberts, of Wisconsin Rapids.

MARYLAND

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate T. Scott Offutt of Towson, Maryland, for the office of State Delegate for and from the State of Maryland, to be elected in 1938:

William J. McWilliams, Noah A. Hillman, Emanuel Klawans and Ridgely P. Melvin, of Annapolis; Walter C. Capper, William S. Jenkins, Finley C. Hendrickson, F. Brooke Whiting, Albert A. Doub, William C. Walsh, George Henderson and W. Earle Cobey, of Cumberland; J. DeWeese Carter, of Denton; Robert H. McCauley, Leo H. Miller, J. Lloyd Harshman, Levin Stonebraker, J. Cleveland Grice, Joseph D. Mish, William P. Lane, Jr., W. P. Wachter, Ellworth R. Roulette, Harry Brindle and Omer T. Kaylor, of Hagerstown;

T. Howard Duckett, John F. Lillard and Walter L. Green, of Hyattsville; F. W. C. Webb, Robert W. Dallas, Levin C. Bailey and Curtis W. Long, of Salisbury; John S. Whaley, of Snow Hill; George M. Berry, H. Richard Smalkin, C. Walter Cole, John Grason Turnbull, H. Courtenay Jenifer, T. Lyde Mason, Jr., and Thomas M. Jenifer, of Towson; Theo. F. Brown, Charles O. Clemson and F. Neal Parke, of Westminster; Philip H. Close, Michael W. Fahey and Frank H. Jacobs, Jr., of Bel Air;

Ernest Volkart, Frederick H. Hennighausen, Morris A. Rome, A. Morris Tyson, John J. Neubauer, W. Conwell Smith, Mason P. Morfit, Paul R. Hassencamp, H. Beale Rollins, F. Gray Goudy, John A. Cochran, Samuel S. Smalkin, John B. A. Wheltle, Michael J. Manley, Albert F. Wheltle, Enoch Harlan, A. B. Makover, William L. Henderson, Charles T. LeViness 3rd, Joseph Kolodny, Edwin J. Wolf, Joseph Bernstein, Alexius McGlannan, III, Albert A. Levin, W. LeRoy Ortel, Charles B. Bosley, Louis S. Ashman, J. A. Dushane Penniman, W. H. Hamilton, Philip B. Perlman, Charles Morris Howard, Edward E. Hargest, Jr., Wm. C. Schmeisser, Isidor Roman, George O. Blome, William L. Marbury, Jr., Jesse Slingluff, Jesse Slingluff, Jr., John T. Tucker, G. C. A. Anderson, Robert R. Carman, L. Vernon Miller, George Forbes, Henry L. Wortche, Robertson Griswold, Ralph Robinson, John Holt Richardson, Charles H. McComas, Maurice E. Skinner, Jacob S. New, Webster S. Blades, Moses M. Rosenfeld, George Moore Brady, Emory H. Niles, Chester F. Morrow, Carlyle Barton, George S. Yost, Irving B. Grandberg, Paul F. Due, Walter C. Mylander, Nathan Patz, G. W. S. Musgrave, John H. Hessey, Wilmer H. Driver, John C. Paterson, Ward B. Coe, Chester A. Albrecht, W. Lester Baldwin, Edwin W. Wells, Stephen W. Leitch, Edward L. Ward, Clarence A. Tucker, James T. Carter, Randolph Barton, Jr., Forrest Bramble, William R. Semans, William L. Galvin, Eben J. D. Cross, H. Webster Smith, Norwood B. Orrick, Harry N. Baetjer, Edwin G. Baetjer, Charles McHenry Howard, J. Crossan Cooper, Jr., Clarence K. Bowie, Edward H. Burke, William L. All, Paul R. Kach, Robert France, Joseph Addison, Edward Duffy, Hiram C. Griffin, Harry L. Price, Wallis Giffen, Nelson H. Stritehoff, Joseph C. France, Charles B. Hoffman, Frank B. Ober, Robert W. Williams, Stuart S. Janney, Morton P. Fisher, Walter H. Buck, J. Clarke Murphy, Edward N. Rich, Morris Rosenberg, Alan Sauerwein, Samuel J. Fisher, Charles C. Wallace, J. Morfit Mullen, Philander B. Briscoe, Allan H. Fisher, Herbert Levy, Gaylord Lee Clark, Laurence Perin, Walter L. Clark, Rozel Thomsen, Clater W. Smith, Francis J. Carey, R. Dorsey Watkins, McKenney W. Egerton, W. Thomas Kemp, Jr., J. Martin McDonough, James Piper, Charles P. Coady, Jr., John A. Farley, Edwin F. A. Morgan, John E. Semmes, Ambler H. Moss, Jesse N. Bowen, Frederick W. Brune, Richard F. Cleveland, Harold Tschudi, Laurie H. Riggs, Gustav F. Sanderson, J. Calvin Carney, George M. White, Charles G. Page, James U. Dennis, Eli Frank, Jr., Leon E. Greenbaum, Sylvan Hayes Lauchhaimer, Seymour O'Brien, Clarence W. Miles, Douglas H. Gordon, Bernard J. Flynn, Paul M. Higinbothom, H. Vernon Eney, Wendell D. Allen, E. McClure Rouzer, William Lentz, Thomas M. Jacobs, George E. Kieffner, J. S. T. Waters, John E. Magers, Foster H. Fanseen, Maurice Gregg, F. Stanley Porter, Ed-

ward G. Lowry, Jr., E. Kemp Cathcart, Geo. W. Dexter, Thomas N. Bartlett, Charles S. Lerch, Clapham Murray, Jr., Austin J. Lilly, Samuel K. Dennis, Joseph N. Ulman, Edwin T. Dickerson, Rowland K. Adams, George A. Solter, Eli Frank, Louis J. Burger, Frederick J. Singley, Robert N. Baer, John I. Rowe, Raymond S. Williams, David L. Elliott, Alfred J. O'Ferrall, Peter Peck, Wm. H. Maynard, Leonard Weinberg, Harry J. Green, John S. Stanley, Roger B. Williams, Vernon Cook, S. Ralph Warnken, Leander R. Sadtler, George Ross Veazey, Chas. Markell, Raphael Walter, John H. Skeen, Sidney L. Nyburg, L. Edwin Goldman, James Carey, 3rd, J. Charles Gutberlet, Herbert M. Brune, Jr., Herman W. Kramer, Arthur W. Machen, C. John Beeuwkes, Daniel Willard, Jr., Henry D. Harlan, and Edgar W. Young, of Baltimore.

Albert E. Donaldson of Catonsville.

Letters of Interest

Senator Burke "Concedes Too Much"

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

SENATOR BURKE, at the Annual Dinner at the Kansas City meeting, said: "In his Constitution Day Address, after calling attention to the fact that the document does not in so many words give to the Supreme Court the power to declare legislation unconstitutional, the President used this language: 'Again and again the Convention voted down proposals to give justices of the court a veto over legislation.'

"The plain inference from that language in the connection it was used could only be that the framers of the Constitution deliberately denied to the court the power to pronounce the supremacy of the Constitution when a statute came into conflict with any of its provisions. If that were true, it would necessarily follow that the Supreme Court has usurped this power."[1]

That last sentence concedes too much. In the case of Juilliard v. Greenman,[2] Mr. Justice Gray said: "As an illustration of the danger of giving too much weight to the debates and the votes in the Constitutional Convention it may also be observed that propositions to authorize Congress to grant charters of incorporation for national objects were strongly opposed, especially as regards bank, and defeated. 5 Elliott's Debates, 440, 543, 544."

When the famous case of McCulloch v. Maryland[3] was argued and decided, neither counsel nor court referred to those proceedings of the Convention, for the very good reason that they were not known. The official journal of the Convention lay in a rather confused mass of papers in the office of the Secretary of State, never put in order or published until 1819,[4] 42 years after the Convention had adjourned, whose labors had been carried on in the strictest secrecy. Madison's journal, more informative than the Secretary's record, did not see the light until 1840.[5]

True, the courts many times in the years preceding 1819 referred to the intent of the framers of the Constitution, trying to ascertain that intent from the state of the country in 1787, the reasons that had led to the assembling of the Convention and the language of the Constitution. Presumably this frequent reference to the intent of the framers was on the theory that the voters in selecting delegates to the State Convention and the members of those conventions in considering whether or not to approve the Constitution, would take it to mean what they thought the framers intended it to mean. For plainly, it is the intent of those who adopted the covenant, not the intent of its proposers that must be sought where the language is not so clear as to exclude construction.

It is also true that the courts in later years, in construing the Constitution, have made use of materials that were not known to the people when they adopted it. So we have a continuous line of references to the intentions of the framers from Chisholm v. Georgia[6] to Steward, etc., v. Davis.[7]

There is another reason why the voting down in the Convention of a proposal to grant power to one or other department of government does not prove that that power is not conferred. Not all the men who assembled in Independence Hall in the spring of 1787 were politically minded, but in the Convention there was sufficient sagacity to prevent an overloading of the Constitution with detail. The members knew that the result of their labors would not easily gain approval; that the less weight of specifications it carried the more likely it would be to win through; that indeed it must be like Judge Gibson's Bill of Exchange, a courier without luggage. Many powers must be left to implication from a few powers expressly granted.

The courts in refusing to enforce rights claimed under statutes in conflict with the Constitution have always maintained that that power is implied in Section 2 of Article VI. Weeks before that section had been recast into its final form members had expressed the opinion that the courts, particularly the Supreme Court, would have and would exercise the right to refuse to enforce claims based on unconstitutional acts.

Early in June Elbridge Gerry had so expressed himself, Rufus King the same day, Roger Sherman in July, but he was referring to state statutes; James Madison on the 23d of July; Gouverneur Morris on the 15th day of August; James Wilson the 2d day of July, Luther Martin and George Mason the same day. On the other hand, John Francis Mercer and John Dickinson held the contrary view.[8]

Later on, Oliver Ellsworth, in January, 1788,[9] told the Connecticut Convention that the courts would have the power to declare acts void. Luther Martin made the same announcement to the legislature of Maryland, November 29, 1787.[10] Alexander Hamilton's similar statement in Federalist, No. 78, is well known.

To return then to Senator Burke's admission, it is unwarranted for two reasons: First, any such action, if taken in the Convention, could not have been known and so could not have influenced the people in their consideration of the meaning of the document which they were asked to adopt. Second, if such action had been taken, it might have signified only, as in the instance of the national bank, that the Convention considered it unwise to grant expressly a power that was implied.

It may be conceded that had it been moved in the Convention to give the court authority to refuse enforcement of unconstitutional laws, the motion would have been defeated by the combined votes of members who did not wish the court to have such power and those who believed the power was already conferred by implication.

E. W. CAMP.

Kansas City, Nov. 22, 1937.

1. The Journal for November, p. 876.
2. 110 U. S. 421.
3. 4 Wheat. 316.
4. Farrand, Records of Const. Conv., vol. I, p. XII.
5. Id. ib. vol. I, p. XV.
6. 2 Dall, 419.
7. 81 Law Ed. 779 (796-8).
8. For these opinions see Farrand op. cit. vol. I, pp. 97 and 109, vol. II, pp. 27, 73, 76, 78, 93, 298, 299.
9. Id. ib. vol. III, p. 241.
10. Id. ib. vol. III, p. 220.

News of the Bar Associations

Nebraska State Bar Association Holds Last Meeting As Voluntary Organization—Integrated Bar Came Into Being on January 1, 1938—Change Achieved by Rule of Court—Addresses, Etc.

THE Thirty-Eighth Annual Meeting of the Nebraska State Bar Association was held at Omaha on December 28 and 29, 1937, with more than 750 attorneys in attendance. That this meeting was so well attended is attributed to the unusually fine program and to the interest in Association affairs which had been stimulated by the launching of an integrated Association. The old voluntary Association passed out of existence with this meeting, and the new Association came into being on January 1, 1938.

President Clinton J. Campbell, of Lincoln, presided over the meeting and in the opening session, on Tuesday morning, spoke on "The Association's Past and Present and Suggested Objectives." The balance of the first session was devoted to receiving committee reports, of which the report on Legal Education was outstanding. Judge E. B. Chappell, chairman of that committee, reported that the Supreme Court had adopted the recommendations of the Association for increased requirements for admission to the Bar. The new rules require two years of college study in addition to a High School education before one may take up the study of law, and also require that law school study shall be in a school which is on the approved list of the standardization agency of the American Bar Association.

HARVEY JOHNSEN
President, Nebraska State Bar Association

The principal addresses at the Tuesday afternoon session were by Lee G. Overstreet, of the University of Missouri Law School, on "Missouri State Bar Administration" and by Hon. Nathan William MacChesney of Chicago, whose subject was "The Law—A Vehicle of Social Progress." The annual dinner of the Association was held at the Paxton Hotel on Tuesday evening with Hon. Merrill E. Otis, of Kansas City, as the principal speaker. Judge Otis spoke on "A Modern Judge Views an Ancient Trial."

Wednesday morning was devoted to sectional meetings which were well attended and which are doing much to stimulate interest in Bar Association activities in this state. Meetings were held by the Junior Bar Section, Insurance Law Section, Municipal Law Section, Real Estate and Probate Law Section, and at this meeting a special section was devoted to Social Security Law. Speakers at the Wednesday afternoon session were Hon. J. J. Thomas of Seward, Nebraska, and Hon. Arthur T. Vanderbilt.

Officers chosen for 1938 are: Harvey M. Johnsen, Omaha, President; Frederick M. Deutsch, Norfolk; Max G. Towle, Lincoln; Barton H. Kuhns, Omaha, Vice Presidents; Golden P. Kratz, Sidney, Member at Large of the Executive Council; George H. Turner, Lincoln, Secretary and Treasurer. Two new members of the Executive Council are to be elected by districts, by mail ballot. The officers thus chosen automatically became the officers of the integrated Association on January 1, 1938. Nebraska is the first state to achieve an integrated Bar Association by rule of court. The establishment of such an Association was a major activity of the voluntary Association during 1937 and culminated in the rendering of an opinion by the Supreme Court on September 20, providing for such Association and promulgating the rules of court under which it is to function.

GEORGE H. TURNER,
Secretary.

W. WALLACE FRY
President, Missouri Bar Association

Officers of Missouri Bar Association for Current Year

AT the 57th Annual Meeting of the Missouri Bar Association held at Kansas City, Mo., on October 1st, 1937, at the same time the American Bar Association was holding its meeting, the following officers for the ensuing year were elected: President, W. Wallace Fry, Mexico; Secretary, James A. Potter, Jefferson City; Treasurer, Paul Buzard, Kansas City; Vice President, 1st District—Julius H. Drucker, St. Louis; Vice President, 2nd District—R. L. Motley, Bowling Green; Vice President, 7th District—Grover C. James, Joplin; Vice President, 8th District—Arthur W. Allen, Springfield.

Following is a brief biographical sketch of President Fry: Born in Mexico, Missouri. Education, Mexico public schools, Missouri Military Academy, at Mexico, Missouri. Entered University of Missouri and graduated from the Law School with LL.B. Degree in 1909. Member of Sigma Nu Fraternity and Phi Delta Phi legal

fraternity. Admitted to Bar in 1909, and has been practicing since that time in Mexico, Missouri. Member of Sons of American Revolution, American Legion, Audrain County, Missouri and American Bar Associations. Member of Board of Directors of Missouri Military Academy, Board of Directors of Mexico Country Club, and Board of Directors of Mexico Savings Bank. President of Alumni Association of University of Missouri Law School, 1936-37. Now Vice-President of Law School Foundation of University of Missouri Law School. In February, 1930, appointed by Supreme Court of Missouri as member of State Board of Law Examiners, and still serving as member of that Board.

Lawyers Association of Kansas City Holds Annual Meeting

AT its annual meeting on January 12, 1938, the Lawyers Association of Kansas City elected Frank P. Barker, President; Blatchford Downing, Vice President; Flavel Robertson, Treasurer, and Frank Terrell, Secretary.

Last year the Association won fourth place in the contest for the Morris B. Mitchell prize offered to the local bar association performing activities most beneficial to the bar and to the public. These prizes are awarded annually by the Section on Bar Organization of the American Bar Association. The activities of the Lawyers Association which won the award were its opposition to a measure introduced in the Missouri Legislature repealing certain statutes regulating disbarment of attorneys, and enacting new laws which for all practical purposes made disbarment a very difficult procedure, and its support of a bill providing for permanent registration for voters in Kansas City.

Mr. Barker has been editor of the Missouri Bar Journal for several years, and was a member of the Executive Committee appointed by Kansas City lawyers for the entertainment of the American Bar Association last year at Kansas City. This Committee not only stayed within its budget, but after the annual meeting returned 24 per cent of its funds to the contributors.

Upon his acceptance of the presidency, Mr. Barker addressed the Association on "A Bar Association a Service Organization." The Association was also addressed by Dr. L. A. Warren of Fort Wayne, Ind., director of the Lincoln Foundation, on the early influences in the life of Abraham Lincoln. Samuel W. Sawyer, retiring president, reviewed the accomplishments of the Association during the past year.

HON. JOSEPH ROSCH
President, New York State Bar Association

New York State Bar Association Holds Sixty First Annual Meeting — Governor Lehman and Senator Burke Warn Against Dangers to Our Institutions—An "American Propaganda" Advocated, Etc.

A GALAXY of unusual speakers made the sixty-first meeting of the New York State Bar Association, held January 20-22 in New York City, a specially interesting occasion. The list included Senator Burke of Nebraska, former Solicitor-General Stanley Reed and Governor Lehman.

The meeting was called to order by President Bond at 2 p. m. on Thursday, January 20, after which the reports of the committee on Nominations and the Executive Committee were presented and an adjournment was taken until Friday at 9:30 a. m.

Immediately after adjournment, there was a meeting of the Section of the Association composed of the Presidents of the Federation of Bar Associations, the Committees on Character and Fitness and Presidents of local Bar Associations throughout the State. Eugene Raines, of Rochester, Chairman of the Section, presided, and Dean Paul Shipman Andrews, of the Law School of Syracuse University, delivered an address in which he analyzed the process of selection of those to be admitted to the bar.

Dean Andrews discussed the subject under the three heads of the process employed, the purposes for which the selections were made, and the results of the selections to date, and made certain suggestions. A general discussion relative to requirements for admission to the Bar then followed, participated in by members from all parts of the State. In the evening the Executive Committee gave a dinner to the Presidents and representatives of the various Bar Associations.

Judge Irving Lehman, of the Court of Appeals, presided on Friday morning at the discussion of the subject selected by the Executive Committee pursuant to Article X, Section 2, of the Constitution, namely, "The Lawyer, the Public and Admission to the Bar." Cornelius W. Wickersham made an address in which he urged that law students receive special training to protect business clients against the new governmental bureaucracy and advocated more and larger character committees to examine candidates for admission, as one means of raising the standards of the profession.

Hon. John W. Davis, Chairman of a Special Committee of the Joint Conference on Legal Education, said that he would hesitate to say that anything in the nature of a fixed quota should be adopted to meet the problem of overcrowding of the bar. Justice Lehman suggested that, after all, the greatest hope for improving the caliber of lawyers was in the law school, where the real spirit of the profession could be inculcated in the students.

This was followed by an address by Arthur A. Ballantine, who was under-Secretary of the Treasury in the Hoover administration, on the subject, "Administrative Agencies and the Law." Accepting the extension of governmental agencies as an accomplished fact, he addressed himself to the problem of finding a way to improve the government service rendered under those agencies. Some plan for securing greater competence in the service could be developed, he declared, if there was a will to do so.

"If the government service comes to be made up in large part of highly competent, disinterested and permanent personnel," he said, "not only will there be better and fairer decisions in particular cases, but we may achieve the betterment of government policy on firm ground, rather than on the grounds of prejudice and personal expediency."

Associate Justice Edward R. Finch of the Court of Appeals made four recommendations for speeding up and simplifying court procedure as chairman of the Committee on Improving Judicial Organization and Administration. His suggestions were: appointment of an administrative judge to coordinate the judicial work in each judicial district; return to the courts of responsibility for their own procedure through the rule-making power, instead of a divided responsibility between the courts and the Legislature; changes to permit the successful party in a litigation to recover more nearly the expenses of litigation, including a reasonable counsel fee, and a more modern method than the present impeachment of judges by the Legislature.

At the afternoon session Hon. George H. Bond, of Syracuse, President of the Association, delivered an address in which he urged lawyers to lay before the public "an unvarnished, nonpolitical and nonpropagandized description of what lawyers mean to America, what they have done and what they are doing every day for their native land."

In the evening Hon. Edward R. Burke, United States Senator from Nebraska, delivered the annual address in the ballroom of the Waldorf-Astoria. He warned that constitutional government in the United States would be undermined unless the people checked forces now at work for the extension of executive power. So long as the judicial power remains as it is under the Constitution, he declared, subject to the process of amendment by the people, the chief danger lies not in the legislative, but in the executive field. Whenever any attempt is made by one or two of the departments of government to infringe on the power of the others, it is imperative that all who believe in the American form of government should denounce and defeat such attempts.

At the meeting on January 22, the Association voted to adopt the report of the Committee on American Citizenship, urging that "American propaganda" be spread in the schools and elsewhere to counteract the propaganda of Communism and Fascism. It adopted other committee reports, including one on aeronautical law recommending legislation for insurance on aircraft, pilots and passengers.

Hon. Joseph Rosch, of Albany, was elected President of the Association and the following other officers and committee members were chosen for the same time:

Vice-Presidents: First District, Allen Wardwell, New York; Second District, Christopher W. Wilson, Brooklyn; Third District, Ellis J. Staley, Albany; Fourth District, James McPhillips, Glens Falls; Fifth District, Warnick J. Kernan, Utica; Sixth District, Owen C. Becker, Oneonta; Seventh District, Eugene Raines, Rochester; Eighth District, Morey C. Bartholomew, Buffalo; Ninth District, Graham Witschief, Newburgh; Secretary, Charles W. Walton, Kingston; Treasurer, Harry M. Ingram, Potsdam.

Executive Committee—First District, Mason H. Bigelow, New York; John G. Jackson, New York; R. E. Lee, New York.

Second District, Edward J. Connolly, Brooklyn; Ralph E. Hemstreet, Brooklyn; Fred L. Gross, Brooklyn.

Third District, James F. Brearton, Troy; Joseph M. Fowler, Kingston; Robert C. Poskanzer, Albany.

Fourth District, Patrick J. Tierney, Plattsburgh; Wyman S. Bascom, Fort Edward; Carl S. Salmon, Amsterdam.

Fifth District, Michael J. Larkin, Rome; George S. Reed, Lowville; Lewis C. Ryan, Syracuse.

Sixth District, Floyd E. Anderson, Binghamton; James S. Flanagan, Norwich; Nathan Turk, Owego.

Seventh District, Paul Folger, Rochester; William F. Love, Rochester; Edward J. Cook, Geneva.

Eighth District, David Diamond, Buffalo; Marion H. Fisher, Jamestown; Philip J. Wickser, Buffalo.

Ninth District, Martin Fay, Yonkers; Charles W. U. Sneed, Newburgh; John E. Mack, Poughkeepsie.

Memorial resolutions were adopted commemorating the careers of four former Presidents of the Association who died in 1937: Elihu Root, Simon W. Rosendale, Morgan J. O'Brien and Col. Wm. M. Dykman.

On Saturday evening, January 22, the annual dinner was held at which one thousand lawyers were in attendance. Governor Herbert H. Lehman delivered an address in which he warned the public to be on its guard against fascist and communist dictatorships. Former Solicitor-General Stanley Reed, who had just been appointed by President Roosevelt as a member of the Supreme Court, Chief Judge Frederick E. Crane, of the Court of Appeals, Hon. John E. Knox, of the District Court of the Southern District of New York, and Hon. Arthur T. Vanderbilt, President of the American Bar Association, also spoke briefly.

Oklahoma State Bar Holds Eighth Annual Meeting—Mineral Section Created—Luncheon for American Bar Association Members in Attendance—Public Relations Committee Urged—Code Revision, Etc.

THE Eighth annual meeting of the State Bar of Oklahoma was held at the Mayo Hotel, Tulsa, Oklahoma, December 28 and 29, 1937. Due to the inclement weather, there were only slightly more than seven hundred lawyers in attendance.

The meeting opened with the usual President's address delivered by the Hon. Felix C. Duvall, President of the State Bar. After the President's address, the general assembly recessed for the purpose of permitting the members to attend the various section meetings. All of the section meetings, to-wit, Criminal Law and Procedure, Probate Law and Practice, Insurance Law, Taxation, Real Estate, Commercial Law and Practice, Corporation Law and the Association of County Attorneys, were well and enthusiastically attended, the two leading section meetings being those of Taxation and Insurance Law.

During the sessions an additional section was created by the Board of Governors, to be known as the "Mineral" Section.

Three of the outstanding contributions to the meeting of the Taxation

HON. FRANK M. BAILEY
President, State Bar of Oklahoma

Section were the papers by the Hon. Randall S. Cobb, Assistant Attorney General, on "Article 10 of the Oklahoma Constitution," and Hon. C. C. Brown, Oklahoma Tax Commissioner, on "Comparative Tax Systems of Oklahoma and Neighboring States," and Mr. Garret Logan of Tulsa, on "Changes in the Theory and Purposes of Taxation."

An innovation in Oklahoma State Bar meetings was that of the Tulsa County Bar Association in arranging for a luncheon Tuesday noon, December 28th, for members of the American Bar Association in attendance. More than 125 members of the American Bar Association attended the luncheon. It had been planned to have a short address made at the luncheon by President Arthur T. Vanderbilt of the American Bar Association. In his absence, short talks were made by the Hon. T. Austin Gavin, Chairman, and Joe S. Lewis, A. W. Trice and Fred B. H. Spellman, Oklahoma Members of the House of Delegates.

Arrangements had been made to have the Hon. Arthur T. Vanderbilt, President of the American Bar Association, address the annual banquet held Tuesday evening, December 28th. Due to inclement weather, and all planes being grounded, President Vanderbilt was unable to be present, much to the disappointment of those in attendance, who had looked forward to hearing his message.

The Hon. Alfred P. Murrah, United States District Judge for Oklahoma, who was to appear upon the program Wednesday, December 29, graciously consented to make the address of the evening.

Judge Murrah issued a challenge to the bar of the State, stating that he felt it an obligation of the bar to assist in the prevention of increasing crime, and that it was a civic duty of the members of the Bar to take an interest in such work; pledging himself, as a Judge and as a member of the State Bar of Oklahoma, to join with any movement of the bar in this direction.

Fred B. H. Spellman, a Member of the State Bar of Oklahoma, and a member of the American Bar Association Committee on the Unauthorized Practice of the Law, addressed the general assembly on Wednesday, December 29th, detailing the work being done by the American Bar Association, calling the attention of the State Bar to the fact that it was to the public interest that the bar continue its efforts to suppress the unauthorized practice, and urging upon the bar that a Public Relations Committee be formed for the purpose of giving the Press accurate information and facts on the work of the Bar in the suppression of the unauthorized practice.

Of particular interest to all members of the Oklahoma Bar was the work of the Code Revision Committee, authorized by the 1937 Legislature, headed by the Hon. Edgar A. de Meueles, of Tulsa, Oklahoma. Mr. de Meueles gave an able and comprehensive report of the program of the Committee to date, in its efforts to bring about a complete revision of the code and statutes of Oklahoma.

The Hon. Sam L. Wilhite, Chairman of the Board of Bar Examiners, gave a complete and comprehensive report of the work of that body during the past year, in its efforts toward raising the standards of admission in Oklahoma, calling special attention to the present low standing of Oklahoma, and urging that the Bar bring about a raising of the standards of admission.

At the close of the sessions, the newly elected Board of Governors of the State Bar of Oklahoma announced the following officers for the ensuing year: President: Hon. Frank M. Bailey, of Chickasha; First Vice President: Logan Stephenson, Tulsa; Second Vice President: J. B. Moore, Ardmore; Third Vice President: G. A. Meacham, Clinton; Treasurer: Walter J. Arnote, McAlester; Executive Secretary: Reuel Haskell, Jr., of Oklahoma City.

REUEL HASKELL, JR.,
Secretary.

Utah State Bar Holds Seventh Annual Meeting—Interesting Addresses—Increased Activity of Committee on Unauthorized Practice Reported—Increase in Membership—General Public Shows Interest in Proceedings, Etc.

As our banquet speaker, Hon. Charles A. Beardsley of California, concluded his remarks and the Seventh Annual Meeting of the Utah State Bar became history, there was no doubt in the minds of members of this Bar that we had enjoyed the outstanding convention of our organization.

Meeting at Ogden December 3rd and 4th, more than half of the active lawyers in this State registered and attended the first Annual Meeting to be held away from Salt Lake since the organization of the integrated Bar. Friday morning was devoted to a welcoming address by Judge J. A. Howell, President of the Weber County Bar Association, followed by the presentation of reports, previously printed and made available for the membership, by the following chairmen of Standing Committees for 1937:

Committee of Bar Examiners, and Advisory Committee on Legal Education, Sam D. Thurman; Cooperation with American Law Institute and American Judicature Society, George H. Smith; Unauthorized Practice, Brigham E. Roberts; Relations with Trust Companies, John D. Rice; Selection of the Judiciary, Dean F. Brayton; Circuit Court of Appeals, Robert L. Judd; Criminal Procedure, Carl A. Badger; Session Laws and Statutes, Clair M. Senior; Law Lists and Directories, Junius S. Romney; American Citizenship, Franklin Riter; Legislation, Lynn S. Richards; Commission on Uniform Laws, Calvin W. Rawlings; Judicial Council, Burton W. Musser; Public Relations, Ralph A. Sheffield; Coordination of Social Security Laws, C. C. Richards; and Federal Court Rules, W. Q. Van Cott.

Following Judge Melvin C. Harris' reading of reports prepared by his Committee on Memorials, twelve Utah lawyers having died during the year, Secretary L. M. Cummings gave his report covering disciplinary actions during 1937, membership and finances.

Luncheon Meetings were then held by the Judicial Council, in cooperation

with the Association of District Judges, Burton W. Musser presiding; the Junior Bar Section, A. P. Kesler, Chairman; and the Advisory Committee on Legal Education, in cooperation with the Committee of Bar Examiners, Sam D. Thurman presiding. At the latter meeting the names of the twenty-three successful candidates in the October examination for admission to the Bar were announced.

Following a general session in the afternoon featured by the address of President Royal J. Douglas, and a discussion of Labor Relations Laws by Chairman William M. Knerr of the Utah Industrial Commission and Labor Board, meetings were held by the Sections on Criminal Law, Insurance Law, Property Law, Public Law, and Commercial Law. The day closed with a stag party held under the auspices of the Weber County Bar Association.

Saturday morning was devoted to an address by Hon. Byron G. Rogers, Attorney General of Colorado, on the Administration of Social Welfare Laws, and a discussion by Hon. Edward F. Richards on the Trade Practices Acts, Federal and State. Luncheon meetings were sponsored by the alumni of Harvard, Georgetown, Chicago, Michigan, and George Washington Law Schools, and Phi Alpha Delta and Delta Theta Phi Law Fraternities. The afternoon session was given over to discussion and action upon the various Committee and Section Reports, and an address by Hon. Sanford Bates, until recently in charge of Federal Prisons.

Mr. Beardsley, a past president of the State Bar of California and a prominent member of the American Bar Association, was an interested spectator at the Saturday meetings, and spoke Saturday evening on the subject, "Some Things I Do Not Understand." Toastmaster at the Banquet, attended by Governor Blood, Chief Justice William H. Folland, and some five hundred lawyers and guests, was Mr. George D. Preston of Logan. President Douglas announced the election of Mr. Musser and Mr. Leroy B. Young of Ogden as the new members of the Board of Commissioners, succeeding himself and past president Frank A. Johnson of Salt Lake City, and of W. Q. Van Cott of Salt Lake as President for 1938. Commissioner George C. Heinrich of Logan was elected Vice-President, and Mr. Cummings was reelected Secretary. A dance followed the banquet, which was held at the Ben Lomond Hotel, convention headquarters.

Convention highlights include:

1. The very evident trend of the program to matters of professional interest. In addition to discussion of various legal subjects before the general sessions, section programs included talks and discussion covering a variety of matters which were of interest and value to the practicing lawyer.

2. The increased activity and work of the Committee on Unauthorized Practice of Law. Seven suits are now pending to enjoin the practice of law by real estate agents, abstracters, and other laymen, in addition to two criminal proceedings, and one contempt citation. In addition, both the Commercial Law Section and the Insurance Law Section are discussing this subject as it pertains to collection agencies and claims adjusters.

3. Detailed reports by the Judicial Council showed Utah Court Calendars practically current and abreast of the work.

4. Without dissent, the Convention approved a resolution of the Judicial Council requesting the Supreme Court to wear robes as a step in increasing respect for the judicial office. A similar resolution with respect to district judges was tabled for further study.

5. The Secretary's report showed an increase in membership and a sound financial condition, in so far as the Utah State Bar was concerned. In contrast was a report by the Junior Bar Section that the first year practice of Utah lawyers had averaged, during the seven years of the State Bar, but $763 in gross income.

6. Progress reports were given by various committees involving reorganization of the Board of Pardons, amendments to the Probate Code, and activity by the Bar in connection with traffic problems.

7. There was evident a general public interest in the Bar, shown in part by the assignment of special reporters to cover the convention, the emphasis placed on work accomplished by the various Utah papers, and the broadcast of speeches by local radio stations.

8. Without dissenting vote, the Utah Plan for Selection of the Judiciary was reapproved.

Taking full advantage of the enthusiasm attendant on such a successful meeting, the new Board of Commissioners has already held several meetings to plan and put under way the work of the Utah State Bar for 1938.

An Important Disbarment Case

GREAT interest has been manifest in the unanimous decision of the Appellate Division of the New York Supreme Court, First Department, on November 5, 1937, in the disbarment proceedings instituted and prosecuted by The Association of the Bar of the City of New York against J. Richard Davis, a member of the New York Bar, whom the Association accused of unprofessional conduct. The charge as stated in the Court's opinion, was that respondent aided and abetted the form of gambling known as "policy" or "numbers" racket and acted in the role of advisor, counselor and friend to gambling and criminal combinations engaged therein.

After extended hearings before a Referee appointed by the Appellate Division, the Referee recommended that Davis be not disbarred. He reached the conclusion that none of the witnesses who testified for the petitioner directly connected the respondent with any person shown to be directing the "policy racket." The Appellate Division, however, voted unanimously to disbar. Its opinion, written by Presiding Justice Francis Martin, will be recognized as an outstanding declaration on the subject of lawyers who undertake to act generally for persons engaged in crimes organized for commercial purposes. The Court's condemnation of the "tapping" of lawyers' telephones is also an important declaration.

After describing the "numbers racket," and reviewing the evidence, the Court reached the conclusion that respondent had an agreement with certain persons conducting the "racket" to defend any of their subordinates who might be arrested in connection therewith. In any event, the Court added, he was undoubtedly accomplishing the same result, with or without a definite retainer. On this point, the opinion reads:

"We appreciate that it is difficult if not practically impossible to obtain direct evidence of charges such as those herein involved. Such charges may, however, be established by circumstantial evidence. In the Supreme Court of Pennsylvania, in 1935, a series of disbarment cases were decided which are strikingly similar to the case at Bar. In In re Herbert W. Salus (316 January Term, 1935), the Court said:

"'It is obvious that direct proof of such agreement is difficult to obtain. The bankers in this type of crime have successfully avoided arrest and cloaked their own connection with the lottery in a veil of secrecy, even from many of their employees. None of the number writers who were arrested could testify as to the identity of their banker. When,

therefore, we have the proven facts that an office is frequently retained to represent parties whom they do not know and who do not know the attorneys before the trial, and where the defendants themselves did not arrange for this representation or pay any fee, and no fee is demanded, and no friend or relation is shown to have procured the services, plainly a legitimate inference may be drawn that the connection of the attorney in these cases is the result of some prior arrangement with the bankers. It is the latter who are anxious to protect the number writers so that they will have no cause for dissatisfaction and no occasion to disclose the operations of the system or the identity of parties by whom they are engaged.

"'It was incumbent upon appellant to explain away the unusual circumstances which attended his representation of so many parties engaged in the same type of crime. His direct admission that Baron employed him on many occasions is tantamount to a confession that he had entered such arrangement with Baron, and the Judges below could not, nor may we, accept his statement that he did not know whether Baron was in the numbers game.'

"It is true that in the above cited case there is testimony that the attorney's firm had represented those who were 'higher-ups' in the 'numbers racket' and had represented a half dozen cases in which a known banker had requested the attorney's services and paid the fees. It would seem, however, that if in the case cited the fact that the attorney was admittedly hired on many occasions by a known banker would give rise to an inference that he had a general arrangement with said banker, then in this case the inference would equally arise that this respondent had an arrangement with those controlling the policy racket from the fact that he represented a great many defendants whose cases were recommended by a 'banker'; that the latter paid the respondent's fees if the defendants failed to do so; that many of the defendants represented by respondent did not hire him and did not know by whom he had been hired; the bail bonds were furnished in most of these cases and that the defendants therein did not pay the premium thereon and did not know who had done so, that the respondent consorted with the persons who controlled the 'numbers racket' and frequented what he called the 'numbers' office in which his brother-in-law conducted a bail bond business." The opinion concludes:

"When properly retained, lawyers have a right to defend persons charged with crime. They must realize, however, that aiding or abetting the commission of crime will not be tolerated. They may not, as did the respondent, undertake to defend persons for offenses thereafter to be committed and thereby encourage the perpetration of crime. The license to practice law does not permit attorneys to engage in criminal activities with their clients nor does it permit them to aid or abet the commission of crimes. It is drawing on the imagination to contend that such practice as was here disclosed is comparable to a general retainer by an association representing persons and corporations engaged in a lawful business whereby the attorney so retained is authorized to appear for and defend members of the association whenever they are sued either civilly or criminally for acts in connection with the prosecution of their business and without being specifically retained on each occasion by the individual defendant. When the conduct and actions of an attorney over a period of years clearly shows that his purpose and intention was to aid and guide a combination of persons engaged in crime, he becomes, in effect, a member of the criminal organization and forfeits his right to membership in an honorable profession."

Rare Volumes Exhibited at Chicago

AN outstanding feature of the exhibit of rare and current law books at the recent meeting of the Illinois Bar Association at Chicago in May was the five volumes of the original Justinian Corpus Juris Civilis. This work was completed under the patronage of the Emperor Justinian. Begun in A.D. 527, there is unfortunately no record of the date the task was finished, but it is known that only one copy was made on parchment.

Shortly after the invention of movable type the Justinian Corpus Juris Civilis was printed and bound in five large volumes, bearing the publication date 1575. There are but three of these complete sets now known to be in existence, and one of them owned by The American Law Book Company of Brooklyn, New York, was the feature of an individual exhibit by that organization that included all the publications covering the encyclopedic field of the entire body of the American law.

Elaborate precautions were necessarily taken for the protection of the Corpus Juris Civilis volumes. They were displayed under glass only, but in such a manner that pages of texts could be read and examined. Most lawyers are fully aware of the existence of these volumes but their display in Chicago constitutes the first time they have ever been shown to the public.

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